Allegheny Ludlum Corporation *and* United Steelworkers of America, AFL–CIO–CLC. Cases 6–CA–26862, 6–CA–26978, and 6–RC–11113

December 22, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On July 28, 1995, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We find it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by its Chief Executive Officer Aronson's statement, at a meeting attended by employee Malloy on November 23, 1994, that employees would lose existing ''flexibility'' if they voted for the Union, as this finding is cumulative of other violations found by the judge, which we have adopted, and thus would not affect the remedy.

We agree with the judge that the Respondent's many violations of Sec. 8(a)(1) provide ample evidence of union animus with respect to its subsequent termination of union supporter Borgan. In light of this finding, we find it unnecessary to rely on the legitimate aspects of the Respondent's ''union avoidance'' campaign, not found unlawful herein, as additional evidence of animus.

The judge found, and we agree, that the Respondent violated Sec. 8(a)(1) by requiring employees who objected to being included in its antiunion videotape to submit a request to be excluded from the videotape and by maintaining a list of objectors as, by its actions in this regard, the Respondent effectively polled employees concerning their union sentiments. Contrary to the Respondent, this finding is not inconsistent with the holding in *Sony of America*, 313 NLRB 420, 428–429 (1993), that the employer there also violated Sec. 8(a)(1) by using photographs of employees in a videotape without the employees' consent. At issue in *Sony of America* was whether the use of the photographs under those circumstances unlawfully coerced employees in connection with a decertification election by creating a false impression of opposition to continued representation. The Board's holding that that respondent's conduct was **unlawful** does not establish that any videotaping of employees with their consent, regardless of the circumstances, is noncoercive and thus lawful.

Contrary to our colleague, we would adhere to the precedent reflected in *Sony of America* for the reasons set forth therein, and we note in any event that there is no record evidence that the Respondent somehow relied on the Board's finding of a violation in that case in structuring its antiunion videotaping found unlawful herein.

The judge found that the Respondent violated Section 8(a)(1) by its supervisor, Smith, telling employee Borgan that neither the Respondent's production employees nor its clerical employees deserved a contract, and that while the Respondent could not do anything about the production unit because it had been in place (and represented by the Union) for many years, the clerical employees ''are just people that work here at the company.'' Smith also stated, in the same conversation, that employees would lose flexibility in their working conditions if they selected the Union as their representative. The judge found that these comments unlawfully demeaned the employees for selecting the Union and thereby threatened employees that representation would be futile because the Respondent would not agree to a contract, and unlawfully threatened employees with loss of benefits.

We have adopted the judge's finding that the threatened loss of flexibility was unlawful, and our dissenting colleague appears to agree with this finding. Contrary to our colleague, we find that the other statements made by Smith during this conversation also violated Section 8(a)(1). Thus, as more fully set forth in the judge's decision, these comments were made against the background of a bitter strike by the production unit employees, who had been represented for many years by the same union seeking to represent the Respondent's clerical workers. Indeed, the clerical workers had worked in the plant as temporary replacements for the strikers. Under these circumstances, we find that Smith's statement—to a leading union supporter—that the clerical employees did not deserve a contract, coupled with his observation that while the Respondent could not do much about the production employees' contract, the clericals were just people who worked there and Smith's contemporaneous unlawful threat of loss of benefits, reasonably tended to coerce Borgan in the manner found by the judge. See *Albert Einstein Medical Center*, 316 NLRB 1040 (1995) (statement that union could not help discharged employee, by denigrating union, conveyed unlawful position that it was futile to support union); *Dlubak Corp.*, 307 NLRB 1138, 1146 (1992), enfd. mem. 5 F.3d 1488 (3d Cir. 1993) (use of disparaging language by an employer to describe other employees coercive); *M. K. Morse Co.*, 302 NLRB 924, 931 (1991) (same).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Allegheny Ludlum Corporation, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[Direction of Second Election omitted from publication.]

MEMBER COHEN, concurring in part and dissenting in part.

I concur in the result. However, I note that the Respondent was purportedly seeking to avoid the pitfalls of *Sony Corp.*, 313 NLRB 420, 428–429 (1993). In that case, the Board found an 8(a)(1) violation based on the fact that the employer videotaped employees at work, without their consent, and included that footage in its antiunion message. The Board found that a viewer would reasonably perceive that the employees in the videotape were expressing antiunion sentiments. In fact, some of them were prounion.

I do not agree with the factfinding of *Sony*. I do not think that a viewer would reasonably conclude, on the facts of that case, that the employees shown in the videotape were antiunion. Thus, I believe that a viewer of the videotape would regard the tape as one side's campaign propaganda rather than an expression of employee support.

The respondent herein purportedly sought to avoid the pitfalls of *Sony* by giving employees the option of not appearing in the videotape. This strategy of the Respondent, however well intentioned, had its own problems. By giving employees this option, the Respondent forced employees to reveal their prounion sentiments. In view of this factor, and because 8(a)(1) violations do not turn on motive, I agree that the Respondent violated that section of the Act.[1]

In my view, the real solution to the problem is that an employer should be able to videotape employees at their work, so long as the videotape does not express the message that all of the employees in the videotape are antiunion. If this were the law, and if an employer stayed within it, the employer would not have to give employees an ''opt-out'' privilege.

On a different point, I do not join in finding that the Respondent, through Supervisor Smith, expressed to employee Borgan that bargaining would be futile, or unlawfully demeaned the Union and its supporters. Smith was expressing his view that the unit employees did not ''deserve'' a contract because they were unskilled. Although this expression of opinion may have been derogatory to the skill level of the employees, it did not denigrate their Section 7 rights and did not purport to reflect a view that the Respondent would never agree to a contract.

[1] Interestingly, this factor was an additional basis for the violation found in *Sony*. I agree with *Sony* to that extent.

Suzanne C. McGinnis, Esq., for the General Counsel.
Donald T. O'Connor and *Leo A. Little, Esqs.*, of Pittsburgh, Pennsylvania, for the Respondent.
Richard Brean, and *Jeffrey Van Hove, Esqs.*, of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Upon charges and amended charges filed by United Steelworkers of America, AFL–CIO–CLC (the Union) on November 22, 1994, January 18, February 1, and April 5, 1995, in Cases 6–CA–26862 and 6–CA–26978, the Regional Director issued an order further consolidating cases, amended consolidated complaint and notice of hearing on March 17, 1995.[1] Included in this proceeding are objections to conduct affecting the results of the election in Case 6–RC–11113. The complaint alleges that Allegheny Ludlum Corporation (the Respondent) engaged in conduct during the course of an organizing campaign by the Union violative of Section 8(a)(1) of the National Labor Relations Act (the Act). It also alleges that Respondent discharged its employee James J. Borgan for discriminatory reasons in violation of Section 8(a)(3) and (1) of the Act.

Hearing was held in these matters in Pittsburgh, Pennsylvania, on April 11–14, 1995. Briefs were received from the parties on or about June 6, 1995. Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with its principal office located in Pittsburgh, Pennsylvania, and with other facilities located in Pennsylvania and other States. It engages in the manufacture and nonretail sale of specialty steel products. Respondent admits the jurisdictional allegations of the complaint, and I find that it is now and has been at all material times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE INVOLVED LABOR ORGANIZATION

It is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONABLE CONDUCT

A. *The Issues Framed by the Complaint and Objections*

Beginning about July, the Union began a campaign to organize a unit of Respondent's employees in the following unit:

> All full-time and regular part-time office clerical employees, plant clerical employees and unrepresented technical employees, including electronic turn technicians employed by the Employer at its Leechburg, Pennsylvania; Bagdad, Pennsylvania; Breckenridge, Pennsylvania; Natrona, Pennsylvania; Natrona Heights, Pennsylvania; Vandergrift, Pennsylvania; and Pittsburgh, Pennsylvania facilities; excluding all quality specialists, production and maintenance employees, em-

[1] All dates are in 1994 unless otherwise noted.

> ployees currently represented by a labor organization, confidential employees including secretary to vice president of human resources, secretary to manager of labor relations, secretary to director of labor relations, employment interviewer, secretary to director of employee relations, employee relations data coordinator, labor relations staffing clerk, secretary to vice president of operations and secretary to director of safety, RNs, fire inspectors and guards, and other professional employees and supervisors as defined in the Act.

An RC petition was filed on October 4, and an election was held on December 2. The election was won by Respondent by a vote of 237 to 225. During the course of the campaign, the complaint alleges that Respondent violated Section 8(a)(1) of the Act, by:

1. About October 26, through Respondent's tax supervisor, David Smith, disparaging its employees because of their union sympathies by informing employees that they did not deserve to have a collective-bargaining agreement.

2. About October 26, through Smith, threatening employees with more onerous working conditions if they selected the Union as their collective-bargaining representative.

3. About November 8, through Respondent's accounting supervisor, John Almquist, threatening employees that, if they selected the Union as their collective-bargaining representative, they would lose existing benefits and that the Union would have to bargain to regain these benefits.

4. About November 14 and 15, by Respondent's employment interviewer, Jan Stevens, and supervisor of communication services, Mark Ziemianski, polling employees about their union sentiments, by distributing to employees a written notice that employees who wished to be excluded from a company-sponsored video for use in its antiunion campaign should notify agents of Respondent that they did not desire to be included in the film's footage.

5. About November 15, by Ziemianski, polling employees about their union sentiments by orally advising them that those employees who desired not to be included in the video described above must submit a written request to Respondent stating that they wished not to be included in the film's footage.

6. About November 23, by distribution of Respondent's publication, ''Your Choice, Edition #2,'' to employees by United States mail, impliedly threatened employees with loss of jobs and loss of job security if they supported the Union.

7. About November 23, by Respondent's chief executive officer, Art Aronson, threatening employees (a) that if they selected the Union as their collective-bargaining representative, the Union would be required to bargain to regain existing benefits; (b) threatening employees that if they selected a union that bargaining would be futile; and (c) threatening employees with job elimination and layoffs if the employees selected the Union as their collective-bargaining representative.

Following the election Respondent is alleged to have violated Section 8(a)(1) and (3) of the Act by, about January 17, 1995, terminating its employee James J. Borgan, and since that date, failing and refusing to employ Borgan.

In addition to the foregoing alleged unfair labor practices, the Regional Director issued an order directing hearing on the following objections filed to the election by the Union:

1. The Employer unlawfully interrogated employees to ascertain whether they supported the Union. (Corresponds to unfair labor practice allegation 4 above.)

2. The Employer unlawfully used the production of an employee videotape to ascertain whether employees supported the Union. (Corresponds to unfair labor practice allegation 5 above.)

3. The Employer unlawfully threatened that it would be futile to vote for the Union. (Corresponds to unfair labor practice allegation 7(b) above.)

4. The Employer unlawfully threatened employees with the loss of benefits, layoff, and loss of employment if they selected the Union to represent them. (Corresponds to unfair labor practice allegations 1, 2, 3, 6, and 7 (a) and (b) above.)

5. The Employer unlawfully promised wage increases, other economic improvements, and job security in exchange for rejecting the Union.

6. The Employer coerced employees by positioning supervisors in or near the polling area.[2]

7. By the totality of its conduct, the Employer unlawfully threatened, intimidated, coerced employees, and destroyed the laboratory conditions necessary for a fair and impartial election.

B. *Did Respondent Violate the Act During the Organizing Campaign?*

Peter Passarelli is organizing coordinator for Region 10 of the Union and was lead organizer in the involved campaign. He was assisted by another organizer Jeanie Hauser. The unit sought to be represented in the involved campaign consists of approximately 481 persons. The Union currently represents between 3000 and 3500 of Respondent's production and maintenance employees. It also represents a unit of technical employees at Respondent's Brackenridge and Leechburg facilities. There had been a prior unsuccessful organizing attempt with respect to the involved unit in 1989. The 1994 campaign began with a meeting in late July. A local newspaper learned of the scheduled meeting and publicized it about 2 days before it occurred. Thus, the Respondent had knowledge of the effort from its inception. Support for the Union's effort appears to have had its genesis in Respondent's actions with respect to salaried employees during and after an approximate 2-month strike by Respondent's production and maintenance employees in late spring and early summer.

When the union-represented production and maintenance workers went on strike, Respondent kept its operation going to one degree or another by using supervisors and salaried nonexempt clerical and technical employees to perform production and maintenance. As a reward for this effort, the employees believed they were to receive a bonus or other tangible benefit. However, when the strike ended in June, they not only did not get such a reward, they were informed that the regular merit bonus plan was being canceled. There was some bitterness engendered among the involved employees by this action. The strike also embittered Respondent's management as it refers to the Union in its 1994 annual report as ''a third party with a clear conflict of interest,'' while reporting the lowest earnings since becoming an independent company.

[2] Objections 5 and 6 were withdrawn by the Union at the hearing.

To conduct its campaign the Union relied to a large extent on an informally established employee organizing committee consisting of about 55 to 60 of the most active supporters of the Union. Both the Company and the Union produced videotapes to aid their respective campaigns. The Union mailed about 300 copies of its video to those employees it felt would be most likely to support the Union in the election. The Union also put out a newsletter to affected employees and distributed other union literature.

The Respondent opposed the Union's organizing effort with a campaign of its own, engineered primarily by a hired outside consultant, Frank Buracy, and Respondent's director of employee relations, Joyce Kurcina. The consultant was a veteran of such campaigns and Kurcina was shown to be very well educated in matters of labor and employee relations and has a depth of experience in the field. She was basically in charge of all aspects of employee relations for the salaried employees and among her responsibilities was what she termed ''union avoidance training.'' She testified that she became aware of the Union's organizing effort in the summer of 1994 and thereafter participated in all aspects of the Employer's response to that effort.

In the campaign the major issues were job security, including the subject of layoffs, pensions and related benefits, and the matter of flexibility. Job security was an issue, according to Kurcina because the Respondent had been experiencing ongoing downsizing. There was a rumor circulating among the involved salaried employees that there was to be a 10-percent reduction in the work force because business was bad. Pensions were an issue because the Respondent had in the past few years changed from a defined benefit pension plan to an employee contribution plan. Some employees favored the former plan or one like it to the one provided. Flexibility was the catchword for a variety of situations in which employees wanted more flexibility in the use of sick time, vacation time, and personal time.

In its campaign, the Respondent used three videos, newsletters, letters to employees from different people, meetings between supervisors and employees, and meetings by Respondent's CEO, Art Aronson, with employees. Kurcina and her staff devised the company newsletters, trying to address all the main issues raised in the campaign. The idea for the newsletter came from the union avoidance consultant and were in response to newsletters being published by the Union. The content of much of the Company's campaign literature was conceived in ''brainstorming'' sessions with Kurcina, Human Relations Counsel Stephen Spolar, Respondent's manager of communication services, Mark Ziemianski, and others.

Respondent also relied on its supervisors to get out its message to employees in the voting unit. They were directed by CEO Aronson to distribute written material to voters, to discuss issues with voters, and to make sure voters attended showings of company videos. This use of supervisors may well have led to the two supervisor-employee conversations alleged to be in violation of Section 8(a)(1) of the Act, as discussed immediately below.

1. Did an October 26 conversation between Supervisor David Smith and employee James Borgan violate the Act? (Complaint allegations 1 and 2 above.)

James Borgan was a longtime salaried nonexempt employee of Respondent. During the campaign, he was employed as an accounts receivable clerk at Respondent's Pittsburgh, Pennsylvania headquarters. He was a member of the Union's organizing committee and is the alleged victim of a discriminatory discharge by Respondent in January 1995. Around the end of October, Borgan had conversations with Supervisors Dave Smith and John Almquist about the campaign. Smith is Respondent's supervisor of tax complaints and audit at the headquarters facility. He supervised two employees, neither of which is in the voting unit. He professed to have no knowledge of Borgan's union sympathies at the time of the conversation.

Borgan gave one version of the conversation and Smith another. Borgan's version is that the conversation began in the bathroom with Smith asking him how the organizing drive was going. The conversation continued as the men left the bathroom and stood in the area of the elevators. Smith said to Borgan, ''This talk about contracts, that seems to be a big issue during the drive.'' Borgan said, ''Yes, it is. It's a very big issue. Smith then said, ''What makes you think you deserve a contract?'' Borgan answered, ''I feel that I'm a skilled worker. The company just came off a strike. Under my belt, I have about four or five different jobs that I could do for the Company, and during the strike, I was asked to go out and work in the steel mill.'' ''With all the experience I have being able to work out in the mill, as well as being able to do paperwork here at the Company, I felt that I was skilled, that deserved a contract.''

Borgan continued, ''Put it this way, Art Aronson has a contract. Other executives have a contract. What would be wrong with us having a contract?'' Smith answered, ''You don't realize. Art Aronson is a very skilled employee, and his services would be wanted all across the country with different companies.'' Borgan said, ''Well, that could be, but mostly with steel companies because that's his background.'' Smith said, ''To tell you the truth, either [sic] the production people or yourselves don't deserve a contract because you're not skilled, you're not smart enough to have a contract.'' Borgan became offended and said,

> ''Well, I don't think that we're unskilled. The production people produce. We have $100 million in sales. That's put out by people that are skilled. During the strike, unskilled office workers produced and sold. The company sold $45 million dollars during the month that I was out in the mill in steel, and I thought that we deserved a contract for what we knew, for what we could do for the company.

Smith retorted,

> ''Let me get this straight. The production people, there's not too much we could do about that because the union has been in place there for many years, and even though it's probably wrong for granting them a contract, there's nothing they could do, the union's

> been there too long. You, on the other hand, are just people that work here at the company. So you were asked to go out and produce steel for a little while and you come back. You're not skilled enough to deserve a contract.

According to Borgan, the topic changed and the conversation continued, with Smith saying, ''You have got to understand, Jim, with having a contract, with being union, you are not going to be able to come and go as you please.'' Smith was speaking to the so-called issue of flexibility. At the time, the salaried clerical employees were able to set up doctors' appointments during worktime, to take half-day or 1-day vacations at a time. Borgan then asked, ''Why not? Our chem lab, which is 50 employees, are already covered. They're salaried, non-exempt employees, and they're in a union, and they're still able to do that.'' Smith replied, ''The only way that the company would be able to keep a tab on you is to put in a timeclock. So you would have to punch in and punch out as you go to these.''

According to Borgan the conversation ended about 15 minutes after it started when the Company's comptroller, Rich Roeser, came in and looked at his watch and then at Borgan, who told Smith he had to go to work. About half an hour later, Smith called Borgan and told him he wanted to apologize for the conversation that morning.

At the next union meeting, Borgan told the persons attending about the conversation. He also told other employees who had observed him talking with Smith and inquired what they were talking about. He identified these employees as Ruth Ann Beach, Jane Diliptus, Shirley Grant, and Diana Mizak. Union committee members and employees Paula Malloy and Rebecca Miller testified that Borgan related the subject matter of this discussion to them and to other organizing committee members.

Smith acknowledged having a conversation with Borgan in October in which the union campaign was discussed. Smith asserts that he did not bring up the conversation and, as noted above, denied knowing prior to the conversation what Borgan's feelings were with respect to the Union. On the other hand, Smith testified that the conversation began thusly, ''Well, as I recall, we exchanged pleasantries and then began a discussion about Jim's involvement—well, began a discussion about the union campaign.''

According to Smith, Borgan told him he deserved an employment contract because Aronson had one. Smith then attempted to make a contrast between the employment contract that Aronson had and one that would be available to Borgan or himself. He told Borgan that Aronson was in very high demand and the Company would give him a contract just to keep him. He then noted that he and Borgan were not in high demand and would be unlikely to get one. He denied talking about collective-bargaining agreements, saying they only spoke about personal employment contracts. Smith denied talking about flexibility or loss of benefits and denied calling Borgan to apologize about their conversation. Smith is opposed to the Union and does not feel the Union would be beneficial for the employees.

I credit Borgan's version of the conversation. I found Smith's attempt to characterize the conversation as one relating only to personal employment contracts and not collective-bargaining agreements to be disingenuous. Smith knew that they were talking about the Union's campaign to organize employees like Borgan, and the Union, if successful, would seek a collective-bargaining agreement covering the employees. Clearly, in the context of the campaign, neither Borgan nor the Union was seeking a personal services contract for each employee. Moreover, Supervisor John Almquist testified that the Company was distributing memos that indicated that under a unionized situation, ''you won't be as flexible, that employees may not enjoy the informal flexibility they presently had.'' Thus, Smith's comments have roots in the Company's publicized position.

Taking at face value Smith's assertion that he was not aware of Borgan's feelings about the Union, we are faced with the situation of a supervisor talking to an employee who is not a friend and is not a known union supporter. Smith's comments that the employees did not deserve a contract and his indication that Respondent would not give them one both disparages employees for supporting the Union and amounts to a threat that voting in the Union would be futile because the Respondent would not agree to a collective-bargaining agreement. By stating that Respondent would not continue its current policies regarding flexibility and would install timeclocks if the Union were voted in, Smith threatened that Respondent would impose more onerous working conditions on the employees because they selected the Union. Both statements clearly tend to demean the Union and its supporters and to restrain and coerce Borgan in his exercise of Section 7 rights. Under all the circumstances, I find the conversation between Smith and Borgan to constitute an unlawful interrogation, an unlawful demeaning of the Union and its supporters, an unlawful assertion that bargaining would be futile, and an unlawful threat to impose more onerous working conditions if the employees selected the Union. *Rossmore House*, 269 NLRB 1176 (1984); *Dlubak Corp*., 307 NLRB 1138 (1992); *Child's Hospital*, 308 NLRB 340 (1992); *House Calls, Inc*., 304 NLRB 311 (1991); *Montfort of Colorado*, 298 NLRB 73 (1990).

2. Did a November conversation between Supervisor John Almquist and employee James Borgan violate the Act? (Complaint allegation 3 above.)

Borgan spoke with Respondent's supervisor of financial accounting, John Almquist, in early November at Almquist's workstation. Almquist supervises four employees, two of whom were in the voting unit. Earlier in the day, at an employee meeting conducted by Respondent's Bruce McGillivray, Borgan had made the comment that, according to Respondent's 1989 annual report, a past change in pension plans had saved the Company several million dollars. McGillivray had disagreed with Borgan and had stated that if Borgan had proof, he would like to see it. Borgan came to Almquist asking if he should take such proof to McGillivray.

They began a conversation and, according to Borgan, Almquist asked Borgan, ''Jim, seriously, do you think that by organizing and trying to negotiate a contract with the Company that the Company is going to negotiate fairly with you?'' Borgan asked, ''What do you mean?'' Almquist said, ''You've got to realize, Jim, when the company goes in to negotiate with you, you're going to start from ground zero, and everything you have now, every benefit you have, you're going to have to bargain for.'' As he did with respect to the

Smith conversation, Borgan related this conversation to the persons attending the next union meeting.

While denying that he initiated the conversation, Almquist admits to having a conversation with Borgan in which the topic of the Union came up. According to Almquist, after Borgan's inquiry about the propriety of showing the annual report to McGillivray, the two men began discussing the pension plans that had been in effect and the one currently in effect. Almquist inquired if Borgan really thought the Company would go against current trends and give employees a benefit plan rather than the current contribution plan. Borgan indicated that he did. Almquist said that according to a company memo, the last two organized locations that tried to negotiate for the former plan were unsuccessful. He continued, ''Realistically, do you really think that you would have the ability to negotiate to the old plan because our Company, they're tough competitors, and the trend in the industry is to get away from the benefit plans and go to the contribution plans.'' Borgan indicated he thought they would because some of the union-represented employees had a benefit plan. Almquist replied, ''Well, that's really not a good analogy because back in the '70's when they were organized, that was the only plan in existence. They never had to negotiate for that pension plan.''

He added, ''Benefits were open to negotiations. But, I knew to be competitive with other companies in Pittsburgh, they would have to have some kind of a benefit package. They weren't going to be thrown away.''

I credit Almquist's version of this conversation. It is not that I found Borgan not to be credible, but Almquist appeared to have a clear memory of what was said in this conversation whereas Borgan's memory was a little vague. Borgan may have drawn the conclusion that Almquist was saying what Borgan testified he said, but I believe that Almquist's version is the more credible. I find further support in the fact that Borgan was very concerned about the pension plan offered by the Company and the pension plan would have been the likely topic of conversation between the two men, rather than the matter of bargaining in general. The question still remains, were Almquist's remarks unlawful even crediting Almquist's version of those remarks. I do not find them to be so. I cannot find from the credited version of the conversation that Almquist threatened that existing benefits would be taken away if the employees voted in the Union. At most, he offered his opinion that the Company, in bargaining, would not revert to an older pension plan. I will recommend that this complaint allegation be dismissed.

3. Did Respondent unlawfully poll employees about their union sentiments during a series of videotaping episodes on November 14–16? (Complaint allegations 4 and 5, above.)

Mark Ziemianski is manager of communication services and suggestion awards for Respondent. During the organizing campaign he was a supervisor and his title was supervisor, communication services. He testified that the company videos were produced by a professional film-making company at the suggestion of the consultant hired to combat the organizing campaign. This film company has made videos for other companies opposing unionization. Respondent's videos were shot on November 14, 15, and 16. Ziemianski estimated that about 17 percent of the eligible voters were filmed. The resulting videos were shown to employees at meetings conducted during work hours. Employees who were filmed on November 14 had no advance notice of the filming, and the first they learned of it was when Ziemianski and the film crew showed up at their workplace.

On November 15, Ziemianski prepared a written notice and handed it out to employees when he arrived to film them. On the same date, he sent a copy of the notice to employees at a facility where it shot film on November 16. On November 15, if an employee indicated to him that they did not want to be filmed, he honored the request. Respondent used two notices, both very similar in wording. The first notice used reads:

NOTICE

> Please be advised that a film crew will be in and around your work areas filming footage for an upcoming video presentation that the company will use to present the facts about your current election campaign involving the Steelworkers. If you prefer not to be used in the footage, please advise either Joyce Kurcina or Steve Spolar as soon as possible. We will be happy to accommodate your request.

Respondent also used another version of this notice which changed the second sentence of the first notice to read: ''If you prefer not to be used in the footage, please advise the video crew. We will be happy to accommodate your request.'' The evidence indicates this notice was handed to employees when the crew arrived to tape.

General Counsel's Exhibit 30 is a 10-page compilation of written notations and recordings of oral communication Ziemianski received from employees who did not want their pictures used in the company video. These notations reflect the names of approximately 30 employees. Some of the notations reflect names of employees who advised in advance of filming that they did not want to appear and they were not filmed. Ziemianski knew some of the employees indicating they did not want to be filmed and others he did not know. With respect to the latter group, he asked Joyce Kurcina or someone in her department to identify them for him. One of the written communications was from employee James Goralka.

Goralka has been employed by Respondent for 17 years and works as a data correction analyst at its Brackenridge facility. About 70 employees falling into the unit description work at that location. On November 14, without any prior notice, two video photographers and Ziemianski came into the area where Goralka and three other employees worked. Ziemianski asked if they could video them and Goralka, stating he was intimidated and caught off guard, allowed it. The employees were to sit at their desks, and on cue, turn around, smile, and wave at the camera. At some point after the crew had left, Goralka found a written notice, possibly left by the crew, stating that a video crew would be coming through and if an employee did not want his or her picture used in the video, they should contact either Joyce Kurcina or Steve Spolar.

Goralka called Kurcina and told her that he and some other employees taped that day wanted their pictures removed from the videotape. Kurcina indicated that the matter was out of her hands and that Goralka should call

Ziemianski.[3] Goralka followed this instruction and left a message on Ziemianski's voice mail. The next day, Ziemianski returned the call and told Goralka that there would be no problem with removing the pictures as requested. Goralka mentioned that several other employees wanted to join in his request, and Ziemianski asked that the request be put in writing and name these other employees. Adhering to this direction, Goralka sent a letter to Ziemianski making the request for himself and in addition the following employees: Joe Daum, Andrea Durci, Therese Burner, Mary Herrington, Kurt Lamendola, Margie Pastorik, Laura Bouchat, Susan Cruson, and Gene Davis. The names of Daum, Pastorik, Lamendola, Burner, Goralka, and Durci also appeared on an open letter to Art Aronson in support of the Union.

No one from management assured Goralka that no action would be taken against him for refusing to be in the video nor was he told that there would be benefits given him if he did appear.

Another employee who requested his picture not be used is Jeffrey Greenwald, an electrical engineer with Respondent. He was promoted to this position after receiving his degree in 1993. He worked for Allegheny Ludlum during the day and attended college at nights. During the campaign, he was in the voting unit and worked as an electrical technician. He testified that he received a copy of the notice about the filming in the company mail.

When he received the notice, he called Spolar and left a message on his voice mail indicating he did not want to be in the video. He does not recall if he gave a reason. At the hearing, he testified that he did not want to get involved, and that he had not made up his mind about his vote.

Sally Minnich is chief dispatcher at the Respondent's West Leechburg facility and was eligible to vote in the election. She testified that during the filming, Ziemianski came to her workstation and said, ''Here is someone who will be photographed.'' Minnich asked what it was for and Ziemianski gave her the written notice saying she could advise the film crew that she did not want to be taped and they would honor her request. She testified that Ziemianski told her that she did not have to be in the video if she did not want to. She said she would do it. The remainder of her office declined to be in the video and were not taped.

Carol Miller works in production control at the West Leechburg facility and was an eligible voter. When the film crew came through that facility, she volunteered to be in the video. Some other employees in her area declined to be filmed and left the area while the taping was going on. Ziemianski was with the crew at the time.

With respect to the company video, Passarelli indicated that he received numerous calls from employees who did not want to be on the company video. He called Respondent to complain about the way the video was being filmed, stating that it was coercive and constituted polling. He indicated that employees should not be required to indicate to any that they did not want to be videotaped. He also requested that the filming be stopped. Respondent continued its videotaping in the same manner despite this request. There is no showing that any employee who made a request not to be used in the company video or that any active union supporter other than James Borgan has had adverse action taken against them by Respondent.[4]

I find that Respondent's actions with respect to its videotaping of employees constitutes unlawful polling of employees. Employees did not voluntarily agree to be videotaped, but on the contrary had to affirmatively ask not to be included. Some employees, including Goralka, were not told in advance of the taping that they could opt out and were not assured that no adverse consequences would befall them if they refused to be taped. The names of the employees declining were kept by Respondent and, thus, their union sentiments could be discerned by Respondent. The list of employees declining to be included in the videotaping survived the taping process for unstated reasons. Respondent was advised by the Union that employees considered the manner in which the taping was being accomplished to be coercive and constituted polling, but did not change its methods. The danger in polling is that the ''employer record-keeping of the employee's antiunion sentiments enables the Respondent to discern the leanings of employees, and to direct pressure at particular employees in its campaign efforts.'' *House of Raeford Farms*, 308 NLRB 568, 570 (1992). Such polling is unlawful even though the list compiled of employees declining to appear in the video was not used in an adverse way, or that management was aware of its existence. Id at 571 fn. 12.

4. Did Respondent violate the Act by, about November 23, distributing Respondent's publication, ''Your Choice, Edition #2,'' which impliedly threatened employees with loss of jobs and loss of job security if they supported the Union?

As noted above, the Respondent as part of its union avoidance campaign distributed to employees a publication called ''Your Choice.'' Kurcina testified that this publication was intended to be readable and respond to the issues raised by the Union in the campaign. She attempted to make the publication interesting and used ideas gained from the format followed by USA Today, with charts, graphs, pictures, and interviews. Edition 2 of this publication is alleged to have contained material that goes beyond allowable limits of what an employer may state during the course of a campaign.

The headline of this publication is ''SECURITY FOR YOUR FUTURE,'' followed by an article which reads:

[3] Kurcina was not involved in the preparation of the notice and believed it was prepared by Spolar. She testified that she first became aware of the notice on November 16, when she received a call from an employee in response to the notice. A number of other employees left messages on her voice mail system and she testified that she transferred these electronically to Ziemianski's voice mail. She also testified that she kept no list of employees calling in response to the notice. Of course, such a list was kept as it is in evidence as G.C. Exh. 30. Kurcina denies that any subsequent personnel decisions were made taking into consideration an employees' willingness or unwillingness to appear in the video.

[4] As noted earlier, the Union also made a videotape for use in the campaign. The video was produced at a union meeting where certain persons were approached and asked to participate in the taping. The Respondent in its questioning of witnesses attempted to make the process appear similar to that which it used to make its videos. However, there is one major difference. The Union could not intimidate people because it has no control over their employment as does Respondent.

> When it comes to your job, are there any words more important to you and your family than ''job security''? Salaried employees at Allegheny Ludlum can feel quite secure in their jobs—and with very good reason. Since 1980, the year when Allegheny Ludlum became an independent company, there have been no layoffs in the salaried ranks . . . repeat, NO LAYOFFS OF SALARIED EMPLOYEES.
>
> This was in spite of poor business conditions that were forcing other companies to lay off their employees by the hundreds. This was in spite of our own work force reductions in Westwood and Wallingford. This was in spite of the closing of Laminations. This was in spite of a program to return to our 1985 head count level. This was in spite of a 10-week USWA strike last spring.
>
> In all of these cases, the Company found ways to manage the situation without resorting to layoffs of salaried employees.
>
> Union organizers claim a whole host of non-union jobs have been eliminated while the remaining nonexempts were expected to pick up the slack and do more work. What they don't tell you is this: since 1980, the total hourly work force dropped from nearly 5,000 to the present number of 3,300.
>
> Brackenridge hourly employment was 2,630 in 1980. Today it's 1,770. That's 33% fewer steelworkers at Brackenridge alone.
>
> Did the union save those jobs in Brackenridge? Of course not. Did the union save jobs anywhere? No. What kind of job security is that?

One of the features in this edition is a purported interview with employee Karen Gallagher. She is employed at a Washington, Pennsylvania plant that was acquired by Respondent in November 1993. It is often referred to as the Jessup Steel plant. The salaried employees at that facility did not vote in the election as they are already represented by the Union. Gallagher was in that unit at one time. She is presently and had been for 6 months secretary-sales correspondent at the Washington facility. This position is not in the bargaining unit as it is a confidential position. Prior to taking this position, she was in layoff status from the plant. Prior to her employment at Allegheny Ludlum at Washington, she had worked at another steel company in the same area. At this job, she was a secretary and was represented by the United Steelworkers of America. She worked there for 18 years before being permanently laid off in a job elimination. She was hired by Jessup in 1993, and worked as a clerical, represented by the Union. She was laid off at the plant in June 1994, after it was Respondent's operation. Respondent closed two departments and she was the lowest in seniority. This information is not set forth in the interview.

The involved interview was given in response to a request from Kurcina and was used in one of the company videos and in Your Choice, under a column called ''Tell It Like It Is.'' The interview reads:

> Karen Gallagher was in the union for a year and was laid off for three months before moving to her current salaried position at Allegheny Ludlum. From her experience as a member of the union, she says she had absolutely no desire to return.
>
> Concerning job security, Karen says: ''*As a salaried employee, I feel I have job security because if it came to a layoff due to a lack of work, the first people to be laid off would be those in the union. And when it comes to laying off the union, it's the lowest person-seniority rules. With salaried employees, it does not.*''[5]
>
> Concerning her layoff and other union experience, Karen says: ''From what my understanding was, it was a permanent layoff because of lack of work and elimination of jobs. I can compare A-L with other places I've worked where I had a lot of experience with a union. I had 18 years of experience with another company, and I was union all those years. Due to elimination of jobs, I lost mine. And it was permanent. The union was the first place they eliminated jobs. Now the company is shutting down. A-L has given me a second chance to work again. As a laid-off union member, when a salaried position came open, I applied for it. The Company gave me a second chance, and I took it. When I went back to work, my son looked at me and said, 'Mommy, does this mean we're not going to be poor anymore?' That's what he said. I wanted to cry.''
>
> Concerning union dues, Karen says: ''In the union, you pay every month to your International and to your local. As a salaried employee, I don't have that expense. I have my Blue Cross, my Blue Shield, my vacation pay, and I don't have to pay the union for them. As a salaried employee, I feel I get the same representation without a union. If I have a problem, I go to my boss. I can settle it that way. When I was in the union, I didn't have any problems that required representation by the local, but I still had to pay that money every month. If the union is brought in, there's no guarantee what rate we will get. Therefore, we could make less money. We could end up paying for our insurance. So in the long run, I don't think we're going to be making any more money than we are now.''

Also included in the involved edition of Your Choice is a cartoon. It depicts a large rat, denoted as ''property of USWA'' pulling a blanket off a happy sleeping employee. On the blanket is printed, ''Secure Job at A-L (Allegheny Ludlum), Salary Continuance, LTD (Long Term Disability Benefits)''. The rat is on a leash held by a hand marked ''USWA.'' The caption of the cartoon says, ''Will they get AL's security blanket.''

Kurcina testified that the cartoon was supposed to reflect that present, employees had certain things, which she called ''certainties.'' By the rat pulling away the security blanket, she was trying to create the impression of uncertainty, if the Union were voted in.

The publication also had an article entitled ''Case in Point: LOCKPORT LAYOFFS.'' The article reads:

> As an employee who has enjoyed the security of no layoffs for 14 years, why would you subject that secu-

[5] On cross-examination, Gallagher testified that the emphasized statement was from her experience and was not referring to the voting unit. However, the article does not make that clear. The same interview is included in one of the Respondent's antiunion videos.

rity to the uncertainties of the bargaining table? Consider Lockport, where there were no layoffs from 1984 to 1989. After coming under union contract, a significant portion of the work force was on layoff. Here are some average percentages of employees laid off each month:

		1989	
November	27%*	December	39%
		1990	
January	17%	July	17%
February	16%	August	12%
March	18%	September	13%
April	18%	October	13%
May	8%	November	32%*
June	12%	December	15%
		1991	
January	9%	July	30%*
February	21%*	August	26%*
March	8%	September	32%*
April	17%	October	41%*
May	12%	November	51%*
June	19%	December	44%*
		1992	
January	43%*	July	27%*
February	32%*	August	23%*
March	37%*	September	24%*
April	20%*	October	12%
May	25%*	November	23%*
June	30%*	December	22%*

The months shown with an asterisk are shown in the article in a different color and reflect months when layoffs exceeded 20 percent of the work force. Lockport is a plant owned by Respondent where the work force is represented by the Union.

The publication also has a caption in the heading reading: ''If you think the USWA can guarantee you job security, think again. It's the Company that has saved people's jobs, not the Union.''

The clear message of the foregoing interview, cartoon, and articles quoted is that the Union cannot prevent layoffs and an equally clear message that unionization in fact will lead to layoffs. No explanation is offered as to why the Respondent can successfully avoid layoffs in a nonunion setting as the lead article trumpets, but will certainly lay off employees, and union employees in particular, if the Union represents the salaried nonexempt employees as urged in the Gallagher interview, the cartoon, and the article about Lockport layoffs. An employer violates Section 8(a)(1) of the Act, when, during a union organizing campaign, it threatens employees by making predictions of adverse economic consequences if the employees designate the Union as their collective-bargaining representative. The general standard was laid down by the Supreme Court in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969);

> [An employer] may . . . make a prediction as to the precise effects he believe unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close that plant in case of unionization.

I find that the Respondent has failed to meet this standard with respect to the involved publication and thus has violated Section 8(a)(1) of the Act. *Gissel Packing Co*., supra; *Texas Super Foods*, 303 NLRB 209 (1991); *Bi-Lo*, 303 NLRB 749 (1991); *Harrison Steel Casings Co*., 293 NLRB 1158, 1159 (1989).

5. Did Respondent violate the Act by statements made by its chief executive officer to employees at meetings held November 23?

Near the end of November, over an approximate 3-day period, Respondent scheduled 1-hour meetings with as many of its voting unit employees as it could in groups of about 20 employees each. At such meetings, CEO Aronson and Kurcina would open the meeting up for comments and questions from the employees. Aronson and Kurcina would then address the comments and answer the questions. Attendance at these meetings was mandatory.

At two meetings at the Brackenridge facility on November 23, what was said by Aronson is hotly disputed. The General Counsel introduced the testimony of two staunch union supporters, Paula Malloy and Rebecca Miller, each of whom gave a version of what was said at the meeting each respectively attended. Respondent produced certain employee witnesses who were in attendance at these meetings and they told what they could remember from these meetings. Kurcina also testified about what she remembers from them. Aronson did not testify.

Paula Malloy is a production clerk at Respondent's Brackenridge facility and has worked for the Company for 19 years. She was a member of the union organizing committee and an open union supporter during the campaign. Her support was known to management, including CEO Aronson. She also was active in the last organizing campaign conducted in 1989. On November 23, she attended a mandatory employee meeting conducted by Aronson and Kurcina. Her version of what happened at the meeting is as follows.

One employee asked Aronson a question and before answering Aronson asked for the employee's name. The employee asked, ''Why do you want to ask my name? Are you going to fire me.'' Aronson responded, ''Well, you know my name is Art, and I would just like to know who I'm speaking to.''

At the meeting Malloy asked Aronson why, if he had a contract, was he so against the employees having a contract. According to Malloy, Aronson said he thought it was in his best interest to have a contract. Malloy testified that during the meeting, flexibility and loss of benefits were discussed, with Aronson saying the employees could possibly be at ground zero and could either lose or gain. According to her, Aronson also pointed out that the employees presently had flexibility with respect to vacations and doctors appoint-

ments, but that employees would not have that flexibility with a union in place.

In this meeting, Malloy also told Aronson that it was not fair for the clerical employees to have to work in the mill at jobs they were not qualified to perform during the strike. She further complained that these employees were promised a raise or bonus for working in the mill, but after the strike ended, the company reneged on this promise. She testified that with regard to this issue, she said, ''I thought that was a slap in the face.'' Aronson replied, ''I knew you would say that.''

She pursued this topic and asked whether the company made a profit while the salaried employees worked in the mill. He indicated that the company did not lose as much as it would have had they not worked in the mill. He then said the company found from the experience that it did not need 40 mill jobs, and when the strike ended eliminated those jobs, laying off affected production and maintenance employees. He ended discussion of this topic, saying, ''Is that what you want to happen to you?'' Malloy then asked, ''Are you saying that if I belong to the Union, I will be laid off.'' he said, ''Oh, no, I can't say that.'' Then he said, ''Do you want the Steelworkers to represent you? Is that what you want?'' Malloy replied, ''Well, at least if I have the Steelworkers represent me, I have recall rights. I have nothing right now.''

At this point, according to Malloy, Aronson had lost his composure and was very upset. He threw his hands in the air and said the meeting was adjourned. After the meeting, she told two other clerks in her department about what happened at the meeting. According to Malloy, they could not believe what Aronson had said about layoffs. She told her supervisor about the meeting and he too was surprised. At the meeting attended by Paula Malloy, Kurcina remembers Malloy talking about vacations and about being unhappy about the treatment of the salaried employees with relation to the strike. According to Kurcina, Malloy asked her where she worked during the strike. Malloy also complained that the job-posting procedure used by Allegheny Ludlum was unfair. Kurcina responded to this.

With respect to the vacation issue, Kurcina testified that this was a personal gripe on Malloy's part and was not related to the Union. Aronson told Malloy that it was unfortunate, but some departments have to operate like that.

With respect to the matter of negotiations, Kurcina said Aronson had a standard statement he used, to wit: ''I don't have a crystal ball. I will tell you what you can get. There's three things. You get more, or less, or the same.'' She denied that he ever mentioned starting from ground zero, a blank check, or a blank piece of paper. She said if he had said something like that, she would have interrupted him.

Louise Ann Rowan is employed at the Brackenridge facility as a secretary and is in the voting unit. She attended the meeting with Aronson in November at which Paula Malloy spoke. She thought Malloy was just trying to make Aronson look bad. She denied that Aronson became upset. She could recall none of the questions Malloy asked or any of the answers given by Aronson. Upon being asked if Aronson said anything with respect to benefits if the Union came in, Rowan recalled he said that things could change if the Union came in. She remembered that he said some flexibility could be changed. This witness exhibited a very poor memory of what was said at the meeting.

Susan Shank is a quality assurance clerk at the Brackenridge facility and was an eligible voter. She attended the Aronson meeting that Paula Malloy attended. She testified that one employee raised the issue of flexibility and Aronson said that the particular problem raised appeared to be unique to the employee's department and that it was something that could be resolved and looked at. She testified that Aronson indicated that he felt the problem could be remedied without the necessity of a union.

With respect to Malloy's questions, Shank remembers her stating that she thought the current way personal days and vacations had to be taken was unfair. She used an example of having scheduled a half day of vacation and then the weather turns bad and she wants to switch her half-day vacation to another day. Currently this would not be allowed. Aronson pointed out that this request would be unreasonable and not fair to other employees in the department. According to Shank, he said that with or without representation, that type of request could not be met, or he did not feel it could. Aronson did not lose his composure in the meeting, in the opinion of Shank. She did not remember any discussion of what would happen to benefits if the Union were voted in. She could not recall if the words ''ground zero'' were mentioned or where negotiations would start. She testified that the meeting ended because it was running longer than scheduled and for no other reason.

She also remembers Aronson saying that he did not know if there would be layoffs. She could not remember his specific statement. The witness was questioned at length about her knowledge of the issues in the campaign and the Company's position to those issues as set forth in the company video and literature. She had virtually no memory of either the issues or positions.

The other meeting at which Aronson is alleged to made statements which constitute violations of the Act is one held the same day. Rebecca Miller has been employed by Respondent for 5 years and works at the Brackenridge facility as a data correction analyst. She was an open union supporter and a member of the organizing committee. During the course of the meeting she attended, Miller made the comment that before the strike, she considered Respondent's upper management to be very ethical and that she had been proud to work for Respondent. However, after the strike ended, she felt shocked by management and felt like she had been slapped in the face. This was because management promised tangible rewards for salaried employees who worked in the mill during the strike, but did not follow through on this promise. Additionally, they took away the salaried employees merit raise for the year.

There was also a discussion between Miller, Aronson, and Kurcina about the differences in the financial and benefit packages between the salaried employees and the hourly, union employees.

Then another employee voiced her fear of being laid off if a union was voted in. Another employee voiced his fear that if a union were voted in, negotiations would start from ground zero. Miller spoke up and said that was not how she understood the law, that if the Union won, they would start from the status quo. Aronson explained the negotiating process by saying that it starts with the Company handing the

Union a blank sheet of paper and saying, ''This is what we offer you. Then the Union asks for the sun, stars, the moon and a whole bunch of money and negotiations start.'' He further stated that the process could take from 2 months to 5 years, and that in 30 to 40 percent of the cases, bargaining does not result in a contract.

Miller disagreed pointing out the Company's bargaining history with unions, and asking why would the Company treat the salaried employees any differently. According to Miller, Aronson got a little more stern and said, ''Well, I guess what I'm trying to say is the company does not want its salaried people to join a union, and if it does join a union, we're going to bring those feelings to the bargaining table.'' The meeting ended on that note.

Miller told her coworkers and the union organizers about Aronson's comments during the meeting.

With respect to the meeting about which Miller testified, Kurcina denied that Aronson ever said that the Respondent would have bad feeling if the Union came in and would bring those feelings to the bargaining table. Kurcina also testified that Miller asked very point blank questions, such as ''what insurance package do the Chem Lab employees have,'' and then comment to the audience, ''we can buy that.'' Miller talked about the union employees' wages and her wages, mentioning her merit increase was unfair 1 year. She called unfair canceling the merit increases following the strike. She suggested the executives refund bonuses paid in 1993 because the 1994 merit increases were not paid. In response to a question about how long negotiations would take, Aronson speculated it can take anywhere from 1 month to 3 years.

She recalled a discussion about layoffs. Aronson, in response to a question about whether there would be layoffs said, ''I'm not sure what you want me to say here. I've already said I can't predict the future.'' An employee commented, ''We want you to say that if we unionize, there wouldn't be any layoffs.'' Aronson replied, ''I can't say what can happen.''

Kurcina testified that in neither meeting did Aronson lose his composure and that each meeting ended after the allotted time and stopped because there was another group waiting for their meeting.

Mary Jo Milberger is a accountant and general ledger clerk at the Brackenridge facility. She was an eligible voter. She attended the Aronson employee meeting attended by Rebecca Miller. Milberger testified that Miller was very forceful and was trying to egg Aronson on. She said Miller was rude. She testified that with respect to benefits, Aronson said that they would be frozen, nothing would be taken away, nothing would be added, and things would have to be negotiated. She said Aronson was calm throughout the meeting. She does not remember Aronson saying anything about negotiations starting at ground zero, or negotiations would start with a clean or plain piece of paper. She recalls nothing discussed at the meeting about layoffs or loss of flexibility. This witness could remember very little about what was actually said at the meeting and could not recall any of Miller's questions. She could not remember if Aronson answered Miller's questions.

The first question that must be answered is whether the testimony of Malloy and Miller is to be credited over the testimony of the other witnesses where they conflict. The prime figure in these meetings was Aronson, who chose not to testify, evidently relying on Kurcina's testimony to refute the involved allegations. One of the key determinations to be made is whether Aronson would lose his composure and, thus, give an answer that may violate the Act. That determination is not aided by his absence from the witness stand. I have carefully considered the issue of credibility with respect to these meetings and believe that the testimony of Malloy and Miller is the more credible. Aronson did not testify and either deny or explain what they allege he said. As I find in the section of this decision dealing with Borgan's discharge that Kurcina is demonstrably less than candid with respect to issues involving the Union, I do not credit her version of what happened at the meetings where it conflicts with that of Malloy or Miller. The other witnesses called by Respondent demonstrated very poor memories of what transpired at the meetings and did not cast doubt on the veracity of Malloy and Miller.

Having credited the testimony of Malloy and Miller, I find that Aronson, by his statements to employees in the involved meetings, violated the Act in several ways. In the meeting attended by Malloy, Aronson's statement that if a union were in place the employees would not have their present flexibility was unlawful. *Child's Hospital*, supra; *Fountainview Place*, 281 NLRB 26 (1986). His statements in the same context that bargaining could start from ''ground zero'' and that the employees could either lose or gain is also unlawful absent any assurance that the employees present benefits would not be summarily taken away. *Shaw's Supermarket*., 303 NLRB 382 (1991); *Dlubak Corp*., supra; *Impact Industries*, 285 NLRB 5 (1987). Aronson's statement with respect to loss of jobs resulting from the strike coupled with his question to the audience ''Is that what you want to happen to you?'' is unlawful. The coercive and threatening nature of this statement was compounded when in response to a following question whether layoffs would result from unionization, he answered, ''I can't say that.'' *Texas Super Foods*, 303 NLRB 209 (1991); *Arkansas Lighthouse*, 284 NLRB 1217 (1987).

In the meeting Miller attended, Aronson violated the Act by his comments on bargaining starting with a blank sheet of paper in the context of the employee question which prompted the statement. *Fountainview Place*, supra. He also violated the Act by his statements that bargaining could take up to 5 years and that 30 to 40 percent of the time bargaining does not result in a contract, combined with his threat to bring hostile feelings to the bargaining table as the statements constitute a threat that voting for the Union would be futile and/or that the Company would bargain in bad faith. Coming from the CEO of Respondent, such comments are seriously coercive and would certainly restrain employees from exercising their Section 7 rights. *Aquatech, Inc*., 297 NLRB 711 (1990).

C. *Did Respondent Violate Section 8(a)(3) of the Act by Terminating the Employment of James Borgan and Thereafter Refusing to Employ Him?*

In *Wright Line*, 251 NLRB 1083 (1980), the Board set the test to be utilized in determining whether protected conduct was a motivating factor in an employee's discharge. Under *Wright Line*, the General Counsel must make a prima facie case proving (1) the existence of protected activity; (2)

knowledge of that activity by the employer; and (3) union animus. Proof of these elements by the General Counsel warrants at least an inference that the employee's protected conduct was a motivating factor in the adverse personnel action and that a violation of the Act has occurred. The General Counsel is not required to prove any particular degree of unlawful motivation as part of the prima facie case. A showing that unlawful motivation played a role suffices. The employer may rebut the General Counsel's prima facie case by showing that prohibited motivations played no part in its actions. If the employer cannot rebut the prima facie case, it must demonstrate that the same personnel action would have taken place for legitimate reasons regardless of the employee's protected activity. In this regard, the employer has both the burden of going forward with the evidence and the burden of persuasion. It is not enough to articulate a legitimate nondiscriminatory reason. The employer must affirmatively introduce enough evidence to persuade the Board that the challenged personnel action would have taken place regardless of the employee's protected activity and the employer's antiunion animus. If insufficient evidence is offered, or if the evidence is unpersuasive, the employer will not have met its *Wright Line* burden and a violation will be found.

In the instant case, Respondent discharged James Borgan, an employee of 16 years, on January 17, 1995, shortly after the election in December. Respondent asserts the discharge was for poor performance over several years and the timing of the discharge was triggered by Borgan's performance in the year 1994. It further asserts that Borgan's protected activity played no role whatsoever in the decision to discharge him. In this regard, both the General Counsel and the Respondent introduced a mass of evidence in support of their respective positions. I believe a careful review of this evidence will demonstrate that, in fact, Borgan was the victim of a discriminatory discharge motivated by Borgan's protected activity.

James Borgan was hired by Respondent in 1979, and discharged on January 17, 1995. At the time of his discharge, he worked at the headquarters facility as a clerk/receipts. He had held this position since April 1990 and was supervised by Patty Hunt. His wage rate at time of discharge was $2044 a month. His job duties primarily included handling payment discrepancy notices, which involved investigating the cause of the discrepancies and forwarding the information to different areas for approval of the discrepancy or to clear up the problem. Secondarily he had some responsibilities for filing, microfilming, and handling what are called ''off-standard'' credit memos.

When the organizing campaign began, Borgan and another headquarters employee, Diana Goslin, volunteered for the organizing committee. He testified that other headquarters employees helped in the organizing effort, but wished to remain anonymous. Union Organizer Passarelli called Borgan the most vocal worker at the Respondent's Pittsburgh headquarters. Borgan attended union meetings, solicited fellow employees to sign authorization cards, appeared in the Union's campaign video, was pictured regularly in union newsletters to employees, and signed letters and organizing literature on behalf of the Union. On at least two occasions, he challenged Respondent's top management at employee meetings, criticizing Respondent over its stance on matters at issue in the campaign. Borgan was unlike most employees at the Respondent's headquarters who Passarelli testified were reluctant to openly support the Union. Borgan succeeded in persuading 28 fellow employees to sign authorization cards. Borgan's activities on behalf of the Union were well known to Respondent's management. The other headquarters employee who was openly in support of the Union, Diana Goslin, transferred during the campaign to another of Respondent's locations at her request. Examples of some of Borgan's protected activities follows.

In October, Borgan was subpoenaed to testify at a preelection hearing conducted by the Board. He came to the hearing with about 20 other members of the organizing committee but was not called on to testify as the Union and Company reached an agreement.

In November, Borgan attended a company meeting where pensions were to be discussed. This was an issue in the campaign as Respondent had different plans in effect for different classes of employees and had changed the plan for salaried exempt employees from a benefit plan to a contribution plan a few years before. The pension plan for the Union represented production and maintenance employees was considered by some to be superior to the plan available to the salaried clerical employees. At this meeting, management was represented by Manager of Human Resources Ronnie McDonnough and was attended as well by Vice President of Human Resources Bruce McGillivray and In-House Human Resources Counsel Steve Spolar. At the meeting, Borgan asked whether the Company had not enjoyed a substantial savings when it switched pension plans a few years earlier. McDonnough referred the question to McGillivray, who answered, ''No, there wasn't.'' Borgan replied, ''Bruce, there was a savings, and it was $6.9 million, and it was in the 1989 annual report.'' McGillivray raised his voice and said, ''No. It isn't.'' Borgan retorted, ''Yes, it is.'' McGillivray then said, ''Jim, if you have proof that that is in there, I want to see it on my desk.''

After the meeting, coworkers asked if he had proof and wanted to see it. Borgan got a copy of the 1989 annual report and highlighted the portion showing the savings he mentioned in the meeting. He left this with McGillivray's secretary. Later, according to Borgan, McGillivray called him and said, ''Jim, I'd just like to ask you one thing before I answer any questions.'' ''Were you jerking me around at that meeting and trying to make me look like a fool?'' Borgan replied that he was not. McGillivray then answered his question saying the savings noted by Borgan was ''cost neutral.'' Borgan questioned the meaning of the term and after a brief argument said he thought McGillivray just made it up.

Passarelli testified that he had a conversation about Borgan with McGillivray, in early November. Passarelli had called McGillivray to complain about alleged activities of an employee who the Union believed was trying to turn the campaign into a racial issue. The Union accused the employee of posting a notice in his work cubicle that identified specifically the NAACP as a charity to which the Union contributed. McGillivray indicated that he was not aware of such a problem, but noted that Borgan was causing him difficulties, and was a ''loose cannon.'' At this point, In-House Counsel Steve Spolar got on the line and indicated he was unaware of an employee creating racial tension. Borgan's

name was not mentioned while Spolar was in the conversation.[6]

Later in November, Borgan attended one of a series of required meetings Aronson held with small groups of employees. This meeting took place on November 28, about 5 days prior to the election. Aronson presided over the meeting, and was supported by Joyce Kurcina. About 15 to 20 employees were in attendance. Employees were encouraged to ask questions after several other employees inquired of Aronson about things on their minds, Borgan engaged in a one-on-one question-and-answer session with him. He began by asking of Aronson, ''Do you have a contract with Allegheny Ludlum?'' Aronson replied, ''Yes, I do.'' Borgan asked, ''Why do you have a contract with Allegheny Ludlum.'' Aronson replied that it was because he thought it would be beneficial for the shareholders, that it would show that the company had trust in him to offer him a contract. Borgan came back, ''But with your contract, you don't have to worry if the company goes under. You are still guaranteed. There are certain guarantees in your contract that you would receive a pension, no matter how long you worked for the company.'' Aronson replied, ''That's true.''

Borgan pursued the discussion, asking, ''You probably have a pension from Lukens.'' Lukens was a company for which Aronson worked before coming to Allegheny Ludlum. Aronson replied by saying he felt that the pension plan at Allegheny Ludlum would be good for the Company and employees and a lot of employees would not want a defined benefit plan (like the represented hourly workers had). Borgan said, ''Well, if that was the case, then he should have the same thing in his contract.'' ''If it was that good, it would be good enough for him.'' Aronson said that that was not necessarily true, that the terms of his contract were agreed upon between him and his lawyer and the Company. Borgan retorted, ''When it comes down to it, a defined benefit package, no matter what happens with you, you're guaranteed that at a certain age. Just like you with Lukens. You'll get a pension from Lukens, you'll get a pension from Allegheny Ludlum, and any place you go after that, you'll have a pension.'' According to Borgan, Aronson was becoming visibly upset with his continued questioning by Borgan. Borgan continued on, saying, ''Speaking of guarantees, our Chairman (chairman of Allegheny Ludlum's Board of Directors) Richard Simmons, has a pension with Allegheny International, which doesn't exist any more.'' Aronson just looked at Borgan, who went on, ''Even though they're under, he's still collecting a pension check from a company that doesn't exist because he was guaranteed that pension in his contract that he had with the company when he worked there.''

Borgan testified that Aronson became upset with him at that point, raised his voice, and said, ''You're out of line.'' Borgan was stunned and sat. Aronson stood up and said, ''That's the end of the meeting. The meeting is adjourned.''

With respect to this meeting, Kurcina, who was in attendance, remembered that Aronson, in response to questions about his contract from Borgan, told the employees that the shareholders wanted him to sign a contract. She testified that Borgan had a list of questions and when Aronson answered one, he asked another. Borgan eventually began asking questions about Richard Simmons' financial situation with the Company. When Borgan started asking a question involving Simmons and his wife, Aronson interrupted him saying he did not see why they needed to get involved in the finances of Simmons and his wife in this meeting, that it was irrelevant to why they were at the meeting. According to Kurcina, Borgan sat down and said nothing else. She said there were a few questions asked by others after Borgan finished. On cross-examination, she could not remember who asked such questions or what they were.

There is no credibility dispute about what happened at this meeting except for the matter of Aronson's composure. Both Kurcina and Borgan agree that Borgan asked personal and critical questions of Aronson and attempted to similarly probe into the personal finances of Simmons and his wife. Because Borgan had been Simmons' chauffeur for several years, he was in a position to know a great deal about Simmons' personal business and may well have been in a position to somehow embarrass Simmons and Respondent. Both Kurcina and Borgan agree that Aronson cut Borgan off at this point. The question is, did he do so in anger or just in a calm, businesslike fashion. On this very critical point of Aronson's response to Borgan's personal and critical probing, I again believe Respondent must suffer the consequences of Aronson's decision not to testify. Again, I would point out that this choice deprived me the opportunity to gauge for myself Aronson's behavior and demeanor in a confrontational situation. Contrary to what Respondent would have one believe about Borgan's personality and demeanor, as will be discussed later, as a witness, he appeared intelligent, composed, and credible. Kurcina was also intelligent and composed but exhibited a facile glibness which undermines her credibility in much of her testimony about Borgan, especially when she attempted to explain away obvious and demonstrable deviations from past practice in the firing of Borgan. Moreover, having observed Borgan, I do not believe he would have given up his questioning of Aronson unless Aronson acted in an angry manner that intimidated Borgan and made him fearful that he had overstepped the boundaries of inquiry that Aronson would permit. I therefore credit Borgan's testimony about the confrontation with Aronson and find that Borgan did in fact anger Aronson to the point that he cut Borgan's questioning off.

On November 30, the Company sent a letter to employees commenting on what it called untruths in the union video. Among other things, it prominently calls untrue the statement Borgan made on the video that the Respondent has gotten more profitable since 1989. It then lists the net earnings for the Company for each year from 1989 through the first 9 months of 1994, showing a diminishing profit in each year.

At this point, I believe that the General Counsel has made a prima facie case that Respondent harbored antiunion animus, which is demonstrated by the union avoidance campaign it conducted, and by the various violations of the Act it committed during the campaign. The General Counsel has also proven that Borgan engaged in a variety of protected activities on behalf of the Union and that Respondent had full knowledge of his union sympathies and many of the specific activities, including his appearance in the union video and the use of his photograph in a number of union publications. It has been demonstrated that one member of upper manage-

[6] McGillivray did not testify and I credit Borgan's and Passarelli's testimony as set out above.

ment, McGillivray, considered Borgan a ''loose cannon'' because of his activities on behalf of the Union, and perhaps more importantly, that Borgan personally angered Respondent's CEO Aronson. Though Borgan was fired on January 17, 1995, the decision to fire him was made in the second or third week of December, very shortly after the December 2 election. This was about as soon as Respondent could get rid of him without running the risk of having his discharge made a reason to overturn the results of the election and force a rerun election. Combined with the other elements required for a finding of discriminatory discharge, I believe that the General Counsel has made a prima facie case of discriminatory discharge.

Respondent has a strong, broad-brush answer to this prima facie case in its statistical evidence. It introduced evidence consisting of a study of the nonexempt salaried performance appraisals given for the years 1993 and 1994. The appraisals were given to employees in 1994 and 1995. The study reflects in the first column the numerical performance rating given employees, with nine being the best rating and one being the worst. The next two columns reflect the total number of employees receiving a given rating for the years 1993 and 1994. As the ratings were given in the year following the performance, that year is the one used in the captions.

Performance of Employees	*1994 No. of Employees*	*1995 No. of Employees*
1	0	0
2	1	1
3	7	6
4	22	20
5	56	60
6	117	138
7	166	205
8	77	92
9	6	6
	452	528

Respondent also introduced an exhibit which showed the 1993 appraisal ratings of identifiable union supporters with their 1994 rating. It showed that other than Borgan, 4 such employees got worse ratings in 1994 than in 1993, 12 such employees improved their ratings, and the approximately 30 other supporters stayed the same. No other known union supporter suffered any adverse personnel action of any sort following the election.

Thus Respondent has demonstrated that there were certainly no across-the-board reprisals against known union supporters following the election. But does this conclusively mean that Respondent did not chose to take reprisal against Borgan individually because of his protected activity? The answer is no. I believe that Respondent did single out Borgan for reprisal. Borgan is the only such supporter characterized as a ''loose cannon'' for his protected conduct by management, and, specifically, by Kurcina's superior. He is certainly the only headquarters employee to openly challenge Aronson on a personal basis and draw Aronson's ire. His statements in union publications were branded as untruths by the same management. He was also physically located in the same facility as top management and, thus, constantly visible to those he had confronted and offended. Moreover, he may well be the only highly visible union supporter that Respondent could find at least surface reasons to support a termination. Thus, I believe and find that Borgan's protected conduct discussed above did form at least part of the motivation behind his discharge.

This finding is further supported by a review of the circumstances and evidence surrounding the discharge. This evidence reveals in the case of Borgan (1) a departure from past practice in the structuring of Borgan's 1994 performance appraisal allowing him to be found deficient; (2) unexplained variances in the rating of Borgan in 1994 versus ratings for previous years; (3) unexplained errors in the documents used to support the discharge; (4) reliance upon old documentation of behavioral problems that did not trigger any discipline at the time of the problems; (5) timing of the discharge; (6) lack of warning that Borgan's discharge would result unless changes in performance occurred; (7) the delay between the date the decision to terminate was made and the date Borgan was advised of the termination, and the lack of consideration of apparently spontaneous improved performance by Borgan for a period of at least a month after the decision to terminate had been made, and (8) a clear showing of disparate treatment when the circumstances of Borgan's discharge are compared with other discharges by Respondent.

1. The reasons given by Respondent for his termination

Borgan was notified of his termination at 4:30 p.m. on January 17, 1995. At about this time, he was approached by his supervisor, Hunt, and told to accompany her. They went to the elevators and Borgan asked what was happening. She told him that he would see when they got there. They went to a conference room where Joyce Kurcina awaited them. Kurcina told Borgan to have a seat and then gave him a letter which reads:

> This letter is to inform you that Allegheny Ludlum has no alternative but to terminate your employment effective today because of your continued and protracted poor performance.
>
> Over the last several years the corporation has done everything in its power to assist you in performing at a level that meets the corporation's expectations.
>
> Action on our part to assist you have included placing you on probation and working with you on your deficiencies, reassigning you to another supervisor, giving you ''second chances'' after you failed to meet the conditions of your probation, i.e., maintaining a ''met expectations'' performance level.
>
> Your performance over the last seven years has ranged from barely adequate to needs improvement to unacceptable; you leave us no recourse but to take this action.''[7]

[7] This letter was composed by Kurcina and given to In-House Counsel Spolar for revision. In the original version the first sentence read, ''This letter is to advise you that Allegheny Ludlum has no alternative but to terminate your employment effective today.'' The letter was also sent to Respondent's independent labor counsel before being given to Borgan.

According to Borgan, he read the letter and told Kurcina, ''This is bullshit.'' Kurcina responded in what Borgan called a snide tone, ''You never thought you'd be fired, did you?'' Borgan answered, ''No. I didn't.'' He was very upset. Borgan was then given his 1994 performance appraisal and he questioned the fact that two items on which he was graded were placed on the appraisal without his knowledge, whereas such items are usually jointly discussed between employee and supervisor before becoming part of the appraisal.

Kurcina's version of the termination meeting follows.

Hunt went through the performance appraisal with Borgan. He stopped at the microfilming entry and said he had finished it. Hunt said a temporary employee finished it and he agreed. He then went to the attendance notation and asked what that meant. Hunt said to him, ''Well, that was when you were missing from your desk. Don't you remember the letter.'' According to Kurcina, Borgan said, ''That's what that is.''

When he learned that he was being terminated, he accused Kurcina of terminating him for union activity. Kurcina testified that she replied, ''No, I'm not doing this because of your union activity.'' When he got to the page stating his employment was terminated, he asked what that meant. Hunt gave him the termination letter. He expressed disbelief and Kurcina told him that he caused his termination with the series of years with poor performance. He accused her of firing him because of union activity and Kurcina denied it, telling him there was no activity in the prior years. He pointed out the years of service and his work in the mill during the strike. She told him his performance during the strike was not taken into account.[8] According to Kurcina, he said he thought he would get a second chance and she asked how many chances he needed. He told her that the termination was coming at a bad time in his life, and she offered to refer him to the Employee Assistance Program. She also told him about the fate of his health insurance and pension plan.

She encouraged him to file for unemployment compensation, a practice contrary to all the other discharges in the record, asserting that she did so because he was incompetent. According to Kurcina, Borgan asked Hunt if he had not performed for her. She said there were times he had performed, but did not perform consistently.

When asked whether she or Hunt said that he did not think he could be fired, Kurcina testified that she told him ''nothing got your attention, Jim. You never seem to think that this is a serious situation. That it would ever come to this.''

Hunt testified that at the meeting she gave him his performance appraisal and he read it. When it came to the part that showed he was being terminated, he asked, ''What's this.'' She then gave him the termination letter. He took a while reading the letter and then looking stunned, asked: ''Oh no, this doesn't mean that I'm fired, does it? I get another chance, right?'' Hunt said ''No, this is it.'' Borgan exclaimed, ''This can't be happening'' and said something about personal problems. Then he said, ''I know this is because of the Union. But that's all over now, Joyce. We voted. It's over, we don't have to worry about that anymore. I can do better. This isn't final. Who do I talk to?'' Joyce said, ''No, indeed. We do not give termination letters to employees and then change our minds.'' Borgan pointed out that he had finished the microfilming and they disagreed.

When asked whether she remembered either herself or Kurcina responding to his charge that the union activity was the cause of his discharge, Hunt answered, ''I don't recall exactly what both of our—I'm sure both of our responses were that this had nothing to do with the Union. You know you've had performance problems the entire time you've been here.'' She recalls Kurcina asking, ''Didn't you think that you, that you were having some problems. Weren't you worried. Whenever you were put on probation, weren't you worried. Whenever you got a needs improvement, weren't you worried. Wasn't it a concern of yours that you got a 4 every year. Weren't you concerned about your employment?'' Borgan replied, ''No, because I always did exactly what I was told.''

Though the three versions of the meeting vary somewhat, they all note that Borgan was surprised by the termination, by the fact he had not been warned that it was in the offing, and the reasons given for the termination. It is also significant in that Kurcina would concede him unemployment benefits, usually a benefit gained only after a hard fought battle for employees terminated by Respondent. I also find it interesting that Kurcina and Hunt kept stressing the number of second chances or warnings Borgan had received, which is simply not true as will be shown at a later point in this decision. I do not draw any other inferences from the meeting, and certainly do not find that Respondent conceded that Borgan's union activity was the cause of the termination in either the words spoken by Kurcina or Hunt, or their tone of voice.

2. Borgan's employment history with Respondent

As Borgan's termination letter first refers to his ''continued and protracted poor performance,'' I will review his employment history noting all the areas in which Respondent found fault.

Borgan began working for Respondent in 1979 and for about the first 8 years of his employment, he worked as part-time chauffeur for Respondent's then CEO and present Board Chairman Richard Simmons, and as a part-time mail clerk. These years are not shown to be a problem in any way. Kurcina testified she first met Borgan in the late 1980's while conducting a meeting of employees in the mailroom. At that time, Borgan was working part time in the mailroom and the other time was acting as Simmons' chauffeur. Borgan came in and she asked him a question about the mail. He answered and then began relating to the group that from his job of chauffeuring Simmons, he had learned that there were all kinds of problems in the Company. He also said that he taped meetings for Simmons and had learned about problems that way. Kurcina told him that she had only a limited time with the secretaries and shut him off. I am certain this testimony was offered to somehow demean

[8] During the strike, Borgan worked in the mill along with other salaried employees in order to keep production going. His work in the mill began on May 24 and ended June 9. Gus Ignozzi was Borgan's supervisor for the period of time he worked in the mill. Ignozzi had several derogatory things to say about Borgan. However, as Respondent does not contend that anything Borgan did during this period played any role in the decision to discharge, and as the subject matter of Ignozzi's testimony was not related to higher management prior to Borgan's discharge, I do not consider this testimony to be relevant to any issue.

Borgan, but it clearly had nothing to do with his termination. Like several other occasions, Kurcina and other members of management did not consider it necessary to see if he really did know what he was talking about.

a. *Borgan's problems with Supervisor Jim Mutton and his probation*

In about 1988, Borgan was transferred to Respondent's accounts payable department at the headquarters facility. In about February 1989, Jim Mutton became supervisor of this department. In that month, Mutton appraised Borgan's work for the year 1988 and gave him a ''Met Expectations'' rating.[9] At some point in the year 1989 after the February evaluation, Borgan and Mutton began experiencing problems with one another. This culminated with Borgan being placed on probation in October 1989 for about a 2-month period.

With respect to this matter, Kurcina testified that she learned from Mutton's supervisor, Jim Fallon, that Mutton was having problems with Borgan. She met with Fallon and Mutton and pulled Borgan's file. It showed that he had received a ''Met Expectations'' on his 1988 performance appraisal. She asked Mutton how an employee can meet his expectations in an appraisal given February 1989 and then a few months later be called a nonperformer. Mutton claimed the appraisal was done only a few days after he took over the department and he wasn't really familiar with Borgan's performance when he filled out the appraisal.[10] Kurcina suggested to Mutton that they place Borgan on probation to see if that solved the problem. She suggested the length of the probation and told Mutton to counsel with Borgan during its duration. The formal probation began October 10, 1989, and continued to December 1989. The probation letter states:

> The intent of this letter is to formally notify you that your performance as an Accounts Payable Clerk is unsatisfactory and highly unacceptable.
>
> On February 1, 1989, we moved you laterally from the function of batching and vouchering vendor invoices to your present position of Accounts Payable Clerk ''B.'' This move was made because the volume of vendor invoices you vouchered as an Accounts Payable Clerk ''C'' was unacceptable. At that time, you were advised of this situation as well as being advised that the move to your present position was on a probationary basis.
>
> Since February 1989, I have had numerous discussions with you in detail about your performance and the areas for improvement. Despite these discussions, I have received complaints from vendors which required you to be reprimanded twice.
>
> Your undiplomatic manner in handling vendor telephone calls and your rude behavior with employees of the Purchasing, Traffic, and Brackenridge Accounting Departments is unacceptable. Your unsatisfactory performance has also caused other Accounts Payable employees to assume your responsibilities.
>
> Accordingly, you will be placed on probation for a period beginning immediately and lasting through December 31, 1989. If your performance does not *significantly improve*, the Company will have no recourse but to *terminate your employment on December 31, 1989.*
>
> I am also attaching a schedule of the responsibilities of your job function. These have been discussed with you in the past.

On January 2, 1990, Borgan was given the following letter:

> In the meeting on October 10, 1989, you were given notice that you were being placed on probation due to poor performance. Your probationary period is now complete and your final evaluation of your performance during this period is that you have attained level of ''Met Expectation.''
>
> This evaluation was primarily based on your improved working habits during this period. This level of performance is a standard you must maintain. Hopefully, the performance issues that required the probationary period to occur are in the past. We honestly believe that you can be a productive member of our Department if your focus and time spent during the day remains on the objectives that the Department has established.
>
> Please understand that you must continue to maintain a ''Met Expectation'' level of performance or permanent dismissal will result.

Borgan filed an EEOC complaint because of the probation.[11] He contends that poor performance was not the basis for his problems with Mutton that led to the probation, rather he believed he was being retaliated against because of testimony he gave in an earlier EEOC proceeding filed by a Brenda DeArment. That employee's case was settled, and the assistant controller, Joe Scuillo, abruptly retired. Borgan gave some testimony involving Scuillo in the case. Borgan believed that Mutton was upset with him over this testimony as Scuillo was Mutton's superior. Borgan testified that he was familiar with Scuillo because in the years he acted as Simmons' chauffeur, he reported directly to Scuillo. According to Borgan, Scuillo would question him about things he had heard while acting as Simmons' driver, and he related

[9] Respondent's employees are formally appraised each year by their supervisors. These appraisals are written and are supposed to be given in the first quarter of the year following the appraisal year. On occasion, the appraisals are given at a later date. As pertinent, for the years 1988–1990, the appraisals were done on forms which gave an overall rating in one of four categories, ''Exceeded Expectations,'' ''Met Expectations,'' ''Needs Improvement,'' or ''Unacceptable.'' In the years thereafter, the forms were changed to add a numerical rating to the four ratings categories. Under the new system, ''Unacceptable'' would be rated 1 numerically, ''Needs Improvement'' would be rated numerically as 2 or 3, ''Met Expectations'' would be rated 4–7, and ''Exceeds Expectations'' would be rated 8 or 9. The higher the numerical rating, the better the performance. Salary increases are based, at least in part, on getting a higher numerical rating from year to year.

[10] Mutton did not testify and thus most of the statements attributed to him and the actions alleged to have been taken by him cannot be verified. Because of this, I have generally credited the testimony of witnesses testifying about what Mutton did and said. In those instances where I have not credited such testimony, I have noted this fact in this decision.

[11] The EEOC ultimately dismissed the complaint, noting that there was insufficient evidence that testimony Borgan gave against a member of management resulted in retaliation.

this during his testimony in the discrimination case. He also related that Mutton had a revolver on the job. Shortly after the testimony was given about Mutton's revolver, a written policy was distributed warning that any employee found with a gun on the job would result in dismissal. Borgan testified that after this policy issued, Mutton assaulted him in the coffeeroom, grabbing him by the shirt, and holding him against a coffee machine, saying, ''I know that you told them I have a gun.'' Borgan denied this charge, and Mutton twice again repeated the charge.[12]

Fearing that his future performance evaluations by Mutton would be affected by this incident, Borgan went to Spolar and reported to him that Mutton was watching him away from work and calling him on the phone and hanging up. Spolar said he would look into the allegations and would get back with Borgan. Borgan testified that he also complained to Kurcina that Mutton was harassing him. He told her that Mutton had asked another employee to collect information on Borgan so Mutton could fire him. Kurcina testified that Borgan was concerned about the charges he made and Mutton's treatment of him. He threatened to sue the Company and said that Mutton was killing him. He alleged that Mutton wanted to physically fight him and had asked another employee to collect information on Borgan in order to fire him. Borgan also alleged that he had voluminous notes on things that Mutton was doing to him.

She sent a memo containing her memory of this encounter to Spolar because the EEOC matter was still pending. Spolar sent her a memo of a similar encounter he had with Borgan. Because of the two incidents, she and Rich Roeser, the Company's controller and person in charge of the department, met with Borgan and told him that he was being laterally transferred from accounts payable to accounts receivable with a new supervisor, Patty Hunt. Kurcina testified that the transfer was made because Borgan was so agitated that she did not believe he could ever work effectively with Mutton again. There was no evaluation made by Kurcina, Spolar, or Roeser as to the truthfulness of Borgan's allegations against Mutton. It appears from Kurcina's testimony that she believed that the transfer would solve the problem without getting to the bottom of the Borgan-Mutton relationship.

This reassignment is noted in the termination letter as one of the actions taken by Respondent to assist Borgan. If Borgan's allegations about Mutton were untrue, I would agree that his was positive assistance on the part of management. On the other hand, if Borgan's allegations were true, then management was really assisting Mutton as he would clearly have been overstepping the bounds of supervision and would have been harassing Borgan. As noted earlier, I find it significant that if the Borgan-Mutton controversy was considered as an important ingredient in the decision to terminate Borgan, it did not choose to call Mutton as a witness to at least deny Borgan's allegations. Moreover, if Borgan's actual work performance at the time was as bad as Respondent would have one believe, and if Respondent did not believe Borgan's allegations about Mutton, why was he not terminated at this point.

b. *Borgan's history under the supervision of Patty Hunt*

Patricia Hunt is the supervisor of the accounts receivable department. She became supervisor in 1989 after 20 years of employment with Respondent. She supervises six employees in her department. Though Borgan was placed under her supervision in early 1990, Borgan's 1989 evaluation was given by Mutton. He rated Borgan as ''Needs Improvement.'' Although Borgan's probation indicated if he got another such rating, he would be discharged, he was not. Kurcina explained that he could not be given a ''Met Expectations'' rating for 1989 as he had been placed in probation that year. She stated that he was not fired for this rating as it would constitute double jeopardy and that the probation was the only penalty he received for his 1989 performance. Hunt was under the impression that once the probation was successfully served, Borgan's probation was lifted and would have no further impact on his employment.[13]

In 1990, he worked under Hunt and, in April 1991, received his first performance rating from her. It also gave him a ''Needs Improvement'' rating. Borgan said it was explained to him that during the first year in a new job sometimes an employee would not be able to meet expectations and may get a ''Needs Improvement'' rating. As was the case in 1990, he did not get discharged for failing to meet expectations. When Kurcina was asked why Borgan was not then terminated pursuant to the terms of the probation, she testified that she did not know. She testified that at about this time, she was involved in another employee's termination and was working with Hunt on that. Evidently, Borgan was not much in Hunt's thoughts either. There was no testimony from Kurcina that during this period following the poor appraisal, that Hunt tried to get Borgan fired. Kurcina's superior at the time, John Scarfutti, was aware of the appraisal as he initialed it.

Borgan's 1991 appraisal, given in April 1992, reflects that he ''Met Expectations.'' Borgan appealed this appraisal and, at the same time, filed an appeal of the 1990 appraisal. Hunt wrote a memo to Kurcina about the appraisal interview on May 12, 1992, after Borgan appealed the appraisal. It reads:

> Per your conversation with Jim Fallon about my performance appraisal of Jim Borgan, here are some notes that I took afterward. I'm not sure that any of it would in itself deserve a reprimand, but he was prepared to fight (he brought lots of notes), and is willing to push as far as he can.
>
> He started out very loud and aggressive. He calmed down, but got excited again.
>
> His first words were—You do nothing but harass and intimidate me because you hate me. You hate me because Mutton hates me. You give me a hard time and everyone knows you do. I asked him to give me a name and he said—everyone, just everyone. He said he

[12] As will be seen in the evidence which follows, much of it introduced by Respondent, Borgan repeated these allegations to Kurcina, Spolar, and Controller Rich Roeser. There was never an investigation of the allegations by Respondent and it chose not to produce Mutton as a witness to deny them. Thus for whatever purpose this evidence may serve, I find that Borgan's allegations are undisputed and credit them.

[13] I believe that this view of the status of the probation is clearly correct. There was never any reference to the probation again during the next 5 years, until it resurfaced in the termination letter. This is true even though Borgan received another ''Needs Improvement'' rating in his 1990 appraisal.

worked with Dick Simmons for 9 years and never had any problems with him, then he pointed his finger at me and said loudly ''Dick Simmons doesn't even know who you are.''

I had given everyone in my department blank copies of the KRA sheets and Major Accomplishment sheets to fill out and explained I wanted to get an idea of what they thought they had done. I did use about 2 from his copies which we talked about, but he said he wanted all that he had written on his final copy. I said no, and tried to explain. He said—No, I want them on here, in fact, I want to appeal, and I want to appeal last year, too.

I put on his PA that he exaggerates too much, and that when you're in a work situation, you should try to be accurate. I gave him examples. (On one occasion he told me he had 600 write-ups to do in the last 3 days and was behind. When I counted them he had 77, when I told him I knew the real number, he said ''Wind Chill Factor.'') I talked about his exaggerations, and he said it was never a problem before, everyone he knows talks like that, and he doesn't understand why I have a problem with it when Dick Simmons never did. He also said—''No, I will never change.''

When I told him I gave him a ''Met Expectations'' I expected him to be happy, but he said—a 4, no, no, I deserve a 9. I said why do you think you deserve a 9 and he said—Because I'm the best, I do my job the best. I said, No, you're adequate. He said—Compared to who? I said—Don't you think I know that you do just enough, just the minimum that you know you can get away with to get by? and he said—Yeah?, what should I do? I asked—Don't you have any goals, any aspirations, do you want to do that for the rest of your life? and he said—Yeah, because I'm good, I'm the best.

He kept trying to turn the conversation around to what was wrong with me. I discussed things that I thought were pertinent, but he told me I was compulsive, that I was inflexible because I won't let him do things when he wants to do them, and that I had lots of problems.

Joyce, I know on paper this looks petty, but maybe that's the point. he is petty, combative, argumentative and manipulative. Actually, I can't come up with enough adjectives to describe what he is really like. He was placed in my department because of his problems with 2 previous supervisors. I was not given a choice! I was willing to ignore his prior history, and bring him into my department, as I would any other new employee. As you can see from the above conversations, Jim and I have a problem working together. I would also like to mention that his behavior, on a daily basis, effects the morale of my department in a negative way.

Please let me know what can be done about this situation.

Either Kurcina or Fallon noted on this memo that the most they would recommend was an oral reprimand, and Hunt indicated it would only make matters worse. Nothing was done. Hunt testified that she considered that Borgan had improved from the previous year.

With respect to the appeal of the 1990 and 1991 appraisals, Kurcina turned them over to an assistant, Gary Phillips, for handling. Phillips denied the 1990 appeal apparently because so much time had elapsed. With respect to the appeal of the 1991 appraisal, Phillips denied it, and sent a written confirmation to Borgan, which reads:

> On September 1, 1992, a meeting was held with you, Patti Hunt, and myself in attendance, to discuss the areas of your 1991 Performance Appraisal with which you disagree.
>
> As you recognized during the meeting, the Employee Relations Department cannot access an employee's performance, but can only review whether the appraisal process had been properly used. In response to a direct question by me, you stated that you did not have a problem with the procedures that were followed.
>
> *As a result of that meeting, it was decided that Patti Hunt and you would meet on or before September 4, 1992, to identify, in writing, KRA's/SOP/s for the 1992 calendar year and any performance problems would be discussed during the year. It is my understanding the KRA's/SOP's have been put in writing.*'' [Emphasis added.][14]

Hunt testified about this meeting and said that ''one of Borgan's complaints was that his KRAs and SOPs were not set up in advance, and he did not have a chance to work toward his goals. So it was decided that, indeed, Jim and I would sit down to set down his KRA's and SOP's and at the time, he said if that is done, I will accept my appraisal.''

For the next 2 years Hunt gave Borgan a ''Met Expectations'' rating. She did not testify that these ratings were given for any reason other than they reflected Borgan's job performance and affirmatively testified that he had adequately managed to get his job done.

c. *Borgan's performance for 1994*

There is a written job description for Borgan's job, which reads:

> 1. Handle payment Discrepancy Notices: Receive ''Payment Discrepancy Notices'' from computer section; review and check related invoices and other associated paperwork to determine cause; prepare necessary correspondence to customer or sales office; compare certain notices with debit book; decide which customer correspondence refers to returned material, reject, or any complaints; log in debit book and send to Customer Relations Section for promptness in approval of credits.

[14] KRAs and SOPs refer to Key Area Results and Standards of Performance respectively. These are terms used on the appraisal forms. The KRAs are the general job responsibilities that an employee is expected to perform and be evaluated with respect to on an annual basis. The SOPs are the results that are expected from the employee with respect to each KRA. The company's consistent practice and, indeed, the appraisal form itself states that at the beginning of each year, the employee and supervisor will meet and mutually agree upon that employee's KRAs and SOPs for the calendar year. The appraisal for that year will be given in large part on the employees performance with relation to mutually agreed upon KRAs and SOPs.

> 2. Maintain Control Records for International Sales Section—Maintain control records; maintain cash book and prepare case statement for International Sales Section.
>
> 3. Assist in Applying Cash; Perform Other Related Tasks: Assist in applying cash; input accounts payable entries and journal voucher entries into the Fortex System; assist in other clerical activities of the department as required; fill in for other office personnel during absences, vacations or as needed; perform other related tasks.

Supervisor Hunt testified that there have been some changes in this job description since it was issued in 1989. The position is no longer responsible for the International Sales Section. It is now additionally responsible for filing invoices on a monthly basis and microfilming invoices on an annual basis. She called these small details, though Borgan's alleged failure to promptly microfilm invoices is said by Respondent to be one of the chief reasons for his termination.

Pursuant to company practice and their agreement from 1991, Borgan and Hunt met in the spring of 1994 and established Borgan's KRAs and SOPs for the year 1994. They mutually agreed that his key result areas were ''training,'' indicating he was to learn a new computer system the Company was planning to implement. However, the system was not installed during 1994 and, thus, this key result could not be met. The next key result expected and agreed upon was to modify and update his desk manual as needed. He had a desk manual which described how to do his job in detail so that a fill-in or new employee could learn the job by reading the manual. Under actual performance the appraisal shows ''no modification made'' and grades this as ''needs improvement.'' Borgan testified that he did not modify his desk manual because no modifications were needed. His desk manual had been prepared by his predecessor in the job and the job had not changed since the preparation of the manual. Although she failed him on this KRA, Hunt in her testimony in this record could not think of anything specifically that would have had to be updated.

The next key result listed is ''attend internal courses offered by company.'' It notes ''none attended for 2nd year in a row even after mention in 1993 area for improvement.'' This is graded as ''needs improvement.''[15] The last training program attended by Borgan was in 1989. Borgan testified that he did not attend any training courses in 1994 because the year was hectic because of the strike and because his workload was too heavy. He noted that during the year work backed up because of working in the mill during the strike and added that additional work was added because of the acquisition of another company, and the untimely death of another employee, whose work was given to Borgan. Kurcina seemed to corroborate this reasoning by Borgan as she testified that during the strike, all training by the Company was suspended to save money. Thereafter, all departments were asking for training programs. As did Borgan, she complained that the workload in 1994 was hectic.

Of real significance is the next KRA. This one was added by Hunt without consultation with Borgan and only after the decision had been made to fire him, totally contrary to established practice and the directions on the form. It reads ''microfilming—added in July—microfilm 92 invoices to make room for Washington invoices.'' It goes on ''no work done in 1994 after being reminded on several occasions.'' This is graded, ''unacceptable.'' Not only was this KRA added after the decision to terminate had been made, it was added after Borgan had failed to meet its terms, with no prior notice that it was an important goal for him to meet. With respect to the matter of changing KRAs and SOPs after they have been established for the year, the parties stipulated:

> There are 23 supervisors at the Respondent's headquarters at 6 PPG Place, who supervise salaried, nonexempt employees that were in the voting unit. Five were unavailable for comment due to various reasons. Of the 18 remaining, 17 of those have not changed KRA's in the year 1994, and one supervisor did change KRA's in the year 1994.

There was no showing that any supervisor changed or added KRAs or SOPs without at least informing the employee that this was being done. I find that Borgan was clearly not so informed. The involved KRA and SOP relating to microfilming was actually added to Borgan's 1994 performance appraisal in January 1995, about a month after the decision had been made to fire him. I am convinced it was added for no other reason than to manufacture an excuse for his discharge. The reference in the involved KRA to ''informed in July'' evidently relates to a cryptic note found on Hunt's computer at some point in time.

> 7/20/94—informed that microfilming had never been finished. when asked about it he said because of the strike, and when asked if he has had spare time since the strike was over and he could start again, he said he just didn't get around to it.
>
> Has only applied one Washington check since 7/5/94 (crucible) and it was a mess. Said he didn't have a choice but to apply it that was [sic].
>
> On phone lots—

This computer notation was never part of Borgan's personnel record. With respect to the microfilming situation in the summer of 1994, Hunt testified that normally they microfilmed invoices from the third year back, which would have been 1991 and indeed, that was the plan at the first of the year. According to a letter of reprimand purportedly given to Borgan in October, he was still being accused of not doing the 1991 invoices and no mention is made of 1992 invoices. It was only in July that she said that she, Borgan, and another employee discussed the possibility of doing 1992 as well. She expressed that she was surprised in July to find that 1991 invoices were not completed, though by her own testimony is an annual job. She said she asked why it was not complete and he said that his time in the mill, where he had worked during the strike, had kept him from finishing them. She indicated that he had had time, and he said that he just had not gotten around to it.

[15] C.P. Exhs. 3 and 5 show that another employee under Hunt's supervision was given the goal of attending training classes 1 year and did not attend any. He was again given this goal the next year and did not attend such classes. This was rated as ''Met Expectations'' by Hunt.

She indicated that on a number of occasions she mentioned the need to microfilm to him, with no results. There are no memos to support this assertion, on her computer or otherwise.[16] Kurcina also testified that Controller Roeser complained to her about Borgan in the summer and fall of 1994. She testified that he said that Borgan was not carrying his weight, and Hunt was complaining to him that Borgan was doing nothing. Roeser did not testify and neither Kurcina nor Hunt could give any specifics about what Borgan was failing to do other than the matter of the microfilming and processing of off-standard credit memos, a chore that did not become the responsibility of Borgan until around the first of December 1994.

Borgan contends credibly that microfilming was never part of his key result area and was overflow work. He had performed microfilming in the years preceding 1994, and this job had never been given the status of a KRA. Borgan did microfilm some invoices in 1994 and completed the microfilm project in January 1995, before he was discharged. A temporary employee also performed some of the microfilming. Borgan microfilmed about 60 percent of the 1991 invoices, probably before March 1994. The remainder of the 1991 invoices were done by someone else, while he was working in the mill during the strike, according to Borgan. He also microfilmed about half of the 1992 invoices in January, with the remainder being done by one or more other employees. Although Hunt was aware in late December 1994 and early January 1995, that the microfilming work which she contends was one of two failings by Borgan that resulted in his discharge had been accomplished, and in large part by Borgan, she did not reconsider the discharge decision.

The last and also undisclosed key result area in Borgan's 1994 appraisal is ''issue off-standard credit memos.'' As was the case with the microfilming KRA, this one was added to Borgan's appraisal in January 1995, without his knowledge and after the decision to terminate had been made. It notes ''added in November—complete off-standards by year end.'' Under actual performance on this point, the appraisal states ''missed November closing deadline and also December.'' This area is graded ''unacceptable.'' Hunt testified that the employee whose prime responsibility it was to prepare these memos permanently left Respondent due to ill health in November. According to Hunt, about a week before Thanksgiving, Borgan was on vacation and she left a note on his desk together with 40 off-standard memos that she wanted for ''year, for month-end closing.'' The month's end was 5 days away. Neither Hunt nor any other member of management contends that this note stated that handling the off-standard memos was not part of Borgan's KRAs, or in any other fashion noted that failure to meet a deadline could result in his dismissal. It should be noted that Borgan, and other employees, had been processing off-standard memos for several years when need to help out the employee with the prime responsibility for this job.

After leaving the note for Borgan to find, Hunt then went on vacation and when she returned, according to Hunt, she found that he had processed only 2 of the 40 memos. Borgan testified about an incident at the end of November when Hunt questioned him about the number of off-standard credit memos he had processed. Borgan replied, ''Geez, I've done so many. I don't know how many I've got done. We'll have to count them.'' Hunt said, ''How many do you have left there?'' There were two left. As I believe that Respondent and especially Hunt did not hesitate to manufacture ''evidence'' of Borgan's failures, I credit Borgan's testimony in this regard.

Hunt claimed they missed the November closing and the December closing and had temps do some of the off-standards. Borgan did about 50 percent of the off-standards done in November and December. She testified that they were being deluged with off-standards. Borgan testified that these credit memos must be processed by hand, rather than by computer. He denies that he missed any deadline, asserting that there are no deadlines.[17] These memos came in on a daily basis, and would accumulate. According to Borgan, they were done when there was time available. He contends that all but a few such memos were done at the date of his termination. With respect to the few not processed, Borgan testified that he was advised by Hunt to leave them for a temporary to handle. I credit Borgan's denial that there were deadlines established for the processing of off-standard credit memos. Certainly there is no evidence that he was told prior to his discharge that such deadlines existed or that failure to meet them could result in his termination.

On another page of Borgan's 1994 appraisal is a notation under the heading ''attendance'' reading ''missing from desk in November.'' He was given a ''needs improvement'' for attendance. It is undisputed that Borgan's attendance in any normal use of that word was excellent. He rarely missed any work in any of the years for which records are in evidence. He testified that at his termination meeting with Hunt and Kurcina, he asked Hunt what she meant by the notation and she said, ''You know what I'm talking about.'' He said, ''The only thing—not that day, but the only thing that I could think of from that was there was a time that she questioned me in October. It was right after the time that I was subpoenaed to come here for the union, for the election.''[18] Borgan testified that on this occasion that he had gone to the bathroom before this normal break and while he was gone, Hunt came looking for him because he had put an ''E'' on his timecard for the day he was at the Board under subpoena. ''E'' denotes an excused absence. Hunt wanted to know who had authorized the excuse. Borgan testified that Kurcina authorized the excuse.

[16] The matter of microfilming is mentioned in an October 29, letter from Hunt to Borgan, which will be discussed later in this decision. For reasons set forth in that discussion, I do not believe this letter was ever given to Borgan.

[17] Borgan testified that he had done off-standard credit memos for the past 5 years and considered the work extremely time consuming. He believes he is capable of doing about 25 such memos a day, stating his writing hand would give out at about that point. Robert McLafferty was hired in February 1995, in part to perform some of the jobs previously performed by Borgan. He testified that he now does the off-standard memos and does about 2 batches of 35 to 40 such memos a month. He testified that he can do one such batch in a day. McLafferty did not mention anything about the existence of monthly deadlines. This witness is a graduate accountant with a lifetime of experience in credit management. He agreed that his experience helps him in preparing the memos.

[18] Borgan was referring to a subpoenaed appearance he made at the Board in connection with the representation petition.

In Borgan's personnel file is a memo to Borgan from Hunt dated October 28, 1994, which reads:

> This memo is to inform you that your absence from your work station on October 25, 1994 between 2 p.m. and 3 p.m. is on record.
>
> During the time I was trying to locate you to obtain an explanation of the coding used on your time card. After a significant amount of time I asked several people if they knew where you were, and had someone check the men's room. Later I also inquired of someone exiting the men's room if you were there. They assured me that you were not. When you returned I questioned you as to where you were, and you replied: ''The bathroom.''
>
> Also, I have asked you repeatedly to file the Washington invoices in binders and start microfilming invoices for 1991 (starting July 20, 1994) to make room for them. To date you have done neither.[19]
>
> In addition, since the quantity of work produced during the hours you assist in Accounts Payable is well below average, your time spent there cannot be justified and you are relieved of that assignment.
>
> These instances are a continuation of your overall substandard job performance.

Borgan testified that he was never given a copy of this memo and he denies he was gone from his desk for an hour, estimating the time at about 20 minutes. He testified that he went to the bathroom and then outside the building to smoke a cigarette.

With respect to the October 25 incident, Hunt testified:

> I went to try to find him at his desk for some coding I was going to ask him about or something. And when I went to look for him, he wasn't there. So I went back to my desk. A little while later I went back to his desk. He still wasn't there. A little while—after a substantial amount of time, I went to his desk. he still wasn't there. I started asking people if they had seen him. I asked Tan, who sits in the next cubicle, have you seen Borgan? He said no. And I said, did anybody see Borgan? Does anybody know where he is? No, nobody knew where he was. So at the time—I think I was walking around looking for him, and I saw Joe Worsberg coming out of the men's room. I said, Joe, is Borgan in there? He said no, nobody was in there but me. So by this time, a very substantial amount of time had passed. So I went down and told Rich Roeser that Jim Borgan was away from his desk for a substantial period of time. He said, well have somebody go upstairs on ten and check for him. So we sent Jim Mutton up to ten, and he checked around, looked in the—As a matter of fact, there was only one closed office, and he even checked the men's room up there. Jim Borgan was not there. We came back down. I kept checking and checking and checking. And finally about three—I guess it was about that hour that—It was about 3:00 when I went back, which was actually his smoke break time. So it was unusual for him to be sitting at his desk. And when I went back, he was sitting there and I said, where have you been? And he said, I was in the bathroom.

On October 25, Kurcina, whose office was at the Brackenridge facility, was called by Fallon who told her that Borgan had been missing from work. According to her, a full-fledged investigation had taken place over Borgan's 20-minute to 1-hour absence at about the time he normally takes a break. She testified that it was apparent that she, Fallon, and Hunt could not come up with a satisfactory answer to where he was. They agreed to give him a written notice or reprimand that he was missing and to bring to his attention the fact that he was failing to perform some duties. Kurcina did not give the written reprimand to Borgan and testified that she was told it was given to him by Hunt or Fallon. Kurcina reluctantly admitted she was aware that Roeser believed that Borgan had gone to the Union's headquarters during the time he was missing.

I find this episode to be incredible. Why, after a clerk is found not at his desk for no more than 30 minutes near breaktime, senior management of a major corporation engage in what amounts to a search party is inexplicable under any normal scenario. In the absence of any rational explanation for such a bizarre reaction, I fully believe that Hunt, Fallon, Roeser, and Kurcina believed he was engaged in some covert union activity. For an idea of how differently the Company has reacted to an employee missing from his workplace in other circumstances, the reader is referred to the evidence adduced in relation to an employee named Lewis Lawhorn, discussed later in this decision. Moreover, I do not believe that the reprimand, if prepared at the time or at a much later date, was ever given to Borgan.

Hunt testified that she showed the October 28 reprimand to Borgan. She took him into an empty office, gave him the letter, and he read it. She said he asked, ''How many more of these do I get before I get fired?'' Hunt said, ''Why don't we just concentrate on what this letter says for the time being.'' According to Hunt, Borgan said, ''You know this is because of the union, don't you.'' Hunt said it was not. ''You were away from your work station for over an hour, and I didn't know where you were.'' He said, ''Well, it's your word against mine.'' She replied, ''Well, we had people look for you.''

I do not believe a word of this testimony. She documented all their other strange conversations and did not document this one or report it to Fallon or Kurcina, even in the face of the charge that it was motivated by union activity. If Borgan had been given a copy of the letter, and if he stated

[19] The KRA Borgan is alleged to have failed to meet indicates he failed to finish 1992 invoices by the end of December. He, of course, was effectively terminated before the end of December though not informed of the termination until later. In the Statement of Position filed by Respondent to the charges in this case, it was not alleged that Borgan failed to microfilm the 1992 invoices, but states that it was the 1991 invoices. Hunt testified that she meant to write 1992 invoices in the October 28 letter, but made an error. I would note that it cannot be determined from looking at the boxes containing the microfilmed invoices for 1991 and 1992 a date of their preparation. Moreover, the notation in Borgan's 1994 appraisal referring to a November attendance problem became the October attendance problem at the hearing. These errors strongly suggest to me that Respondent, and especially Hunt and Kurcina, were in the process of manufacturing reasons to fire Borgan after the decision was made and had little concern for the true state of affairs.

as Hunt alleges he did that it was caused by his union activity, clearly a charge would have been brought by the Union at the time the letter was given to Borgan. No such charge was filed. I believe the October 28 letter was one more example of manufacturing reasons to fire Borgan and I do not believe there is any way to verify when it was written.

Reference to the purported reprimand will also reflect that no discipline is threatened or given. No suggestions for a course of action is given.

On the last page of the 1994 appraisal is a notation relating to ''Areas for Improvement and Personal Development Plan.'' Under this is handwritten, ''needs to learn to follow instructions—accept authority; lacks motivation; insubordinate and combative; unwilling to take on extra work; requires substantial supervision; unable to meet deadlines.''

Borgan testified that no one in management ever told him he was combative or insubordinate. Indeed, his 1993 appraisal makes no mention of these problems, nor does his 1992 appraisal. His 1991 appraisal mentions that he ''tends to challenge authority and dispute decisions.'' Other than Borgan's questioning of McGillivray and Aronson in employee meetings, noted above, I can find no evidence of Borgan's insubordination or combativeness.

3. Disparities in Borgan's performance appraisals

Comparing the various performance appraisals reveals some inconsistencies between the 1994 appraisal and those that had gone before. For example, Borgan was found to need improvement in the 1994 appraisal for failing to update his desk manual. Yet in the 1993 appraisal, he met expectations in this area without modifying the manual and the appraisal notes, ''desk manual on hold until implementation of new system.'' The new system was not implemented in 1994, just as it had not been implemented in 1993. Borgan's 1992 appraisal notes that his desk manual had been prepared by his predecessor in the job. It does not grade this fact positively or negatively.

In the 1992 and 1993 appraisals, Borgan met expectations in the training area though he did not attend any company training courses in those years. The same behavior in 1994 netted him a needs improvement rating although clearly 1994 was a year in which work duties were more pressing due to the strike and the use of clericals to fill in for strikers. The notation on the 1994 appraisal that Borgan had not attended such classes for the past 2 years is also incorrect as by Borgan's admission, he had attended no such classes since 1989. As noted earlier, another employee under Hunt's supervision was given a ''Met Expectations'' rating under similar circumstances.

Also, as discussed earlier, Borgan had never had his KRAs and SOPs changed after they had been agreed upon.

4. The decision to terminate

In general terms, Kurcina described the termination decision process, saying that the Company does not have a progressive discipline policy for salaried, nonexempt employees. Decisions to discharge these employees are based on work history, whether there were work infractions, performance problems, and length of service. Each case is considered on its own merits.

Kurcina indicated that because of all the problems about Borgan she was hearing from Roeser and/or Hunt, she told Hunt in November to get the specifics. Of course, in November, the problems with the off-credit memos had not occurred and Borgan would still have had a month to finish the microfilming, if indeed, there was any assigned microfilming still to be done.

According to Kurcina, Hunt told her specifics in November and she told Hunt she would get back to her when she could. Because of the press of business and a vacation, she testified that this was in December, after the first week. In December, she met with Hunt, Fallon, and Roeser about Borgan. She testified that she did what she always does when she decides to terminate someone, she asked if there was anything they could do to turn the situation around. They all said no, that he had been given a lot of warnings and opportunities to do that. Hunt and Fallon left the room and Kurcina and Roeser said, ''Okay. Let's terminate him.'' Kurcina testified that the matter of Borgan's union activities did not come up in this meeting. On the other hand, both Spolar and outside labor counsel were consulted about proposed termination.

Spolar testified that Kurcina told him ''that there were grounds to discharge this person (Borgan) for poor performance, and she had the grounds for poor performance. And that's what we had always—not always—I don't know always, about that term. But, that the company needed to move forward because of this poor performer, and it justified the termination.'' He identified the grounds as Borgan's overall work performance during 1994.

As far as I can determine from credible evidence, Borgan had not been warned that his job was in danger since his probation in 1989. Even if one credits Respondent's assertion that the October 28 letter of reprimand was given to Borgan, and I do not, it still does not warn him that his continued employment is in question. Neither this letter nor any other document adduced by Respondent shows that any attempt was made to warn Borgan, to counsel Borgan, or to take any positive step to correct any of the deficiencies alleged in his performance. As much as Respondent calls Borgan's performance deficient, it ''Met Expectations'' in 1991, 1992, and 1993. Borgan was microfilming in those years and was preparing off-standard credit memos as well. These items had never before been the basis for judging his overall performance nor had they ever been shown to be a significant factor in his performance rating. To let them become the basis for his discharge without even letting him know that they had assumed a new importance belies any assertion that Respondent cared whether Borgan's performance improved or not. Contrary to the assertions of Respondent's witnesses, I believe the determination to fire Borgan for his union activities was made first, and then legitimate business reasons were sought to justify that decision.

After the decision had been made to terminate Borgan, Hunt was told to prepare Borgan's 1994 performance appraisal. Kurcina gave the okay to add to this appraisal the KRAs that Borgan purportedly failed to meet. She testified that Hunt assured her that she had specifically told him that he was to do these things. Kurcina gave a long dissertation about why it was important that KRAs can be changed during the course of the year to meet changing needs. Although the record reflects that this is rarely, if ever, done; assuming

for sake of argument that a good case could be made to change the KRAs, it does not explain at all why Borgan was not told at any time before his termination that the microfilming job and the off-standard credit memos were being added to his KRAs. This is especially true in light of the agreement between Hunt, Phillips, and Borgan that all his KRAs would be in writing and fully explained to him by Hunt. Hunt admitted that she did not tell Borgan about the changed KRAs before his discharge, and further admitted she had never theretofore changed or added a KRA to an employee's performance appraisal after they had been mutually agreed upon. She saw him microfilming the invoices for 1991 or 1992 or both in January 1995 before he was notified he was fired. She testified that he was performing very well during that period, yet no consideration was given to a reconsideration of the termination decision.

5. Borgan's discharge constitutes disparate treatment when compared to other discharges

Respondent provided the files of all discharged nonexempt salaried employees falling within the bargaining unit description from 1990 to the date of hearing. An examination of these other terminations reflect that almost all of them were given to employees with far less seniority than Borgan and the discharges were for far more serious transgressions. In summary form, they reflect:

a. Catherine Obey was hired on May 21, 1990, and discharged on September 22, 1993, for absenteeism when she failed to provide medical proof of illness or report to work after a month's absence from her job.

b. D. Neil English was hired on December 4, 1991, and discharged on February 16, 1992, while still in his probationary period. Among other failings in his brief employment, Respondent documented nine failures to do his job properly in 1 week. This was in addition to a number of other documented failures.

c. Evelyn Daley was hired November 30, 1990, and discharged on June 26, 1992, for poor performance. She was placed on probation following her first performance appraisal and did not perform as required during probation. On her detailed planned performance (or key areas), she was found to need improvement in 10 of 12 such areas, and met expectations on only 2. The appraisal contains a note from her supervisor reading, ''Comparatively, Daley's performance level in 1991 began shakily, improved somewhat, but finished inadequately. Performance is not up to the standards of the others in the Dept. In view of her short time with the company, performance must markedly improve.''

d. Mary Magoc was hired on October 2, 1992, and discharged on July 18, 1994. On her only performance appraisal, for the year 1993, Magoc was rated as a 2. She was placed on probation for poor performance in June 1994 and did not successfully complete this probation. The actual reason for her discharge cannot be determined from the file.

e. Ken Wood was employed on December 14, 1987, and discharged on June 4, 1991, for inadequate performance. He was placed on probation on April 30 for 60 days and was referred to the Employee Assistance Program for problems with stress. He did not complete the probationary period.

f. Shirley Simms was employed on August 22, 1990, and discharged February 4, 1993, for failure to comply with a work agreement related to substance abuse.

g. Marja Christmas was employed on February 1, 1989, and discharged on May 15, 1991, for absenteeism related to substance abuse.

h. Lewis Lawhorn was employed on January 18, 1985, and discharged on March 10, 1993, for being insubordinate to his supervisor, being disruptive, and for failure to take responsibility for his work. He was placed on a 90-day probation on August 31, 1992, and given a 2-week suspension in December 1992. His probation was extended at that time with the note that any further insubordination would result in his termination. Charging Party's Exhibit 1 reflects that Lawhorn repeatedly engaged in conduct that was insubordinate, disruptive, and irresponsible throughout his probation period. On March 5, 1993, Lawhorn was told to do certain work and Lawhorn told his supervisor, ''I have enough problems right now without putting up with any of your crap'' and walked away. His supervisor told him to return and Lawhorn kept walking, telling his supervisor, ''No, you come here.'' Lawhorn's personnel file contains documentation reflecting approximately 50 recorded confrontations between Lawhorn and his supervisor over an approximate 2-1/2-year period, during which Lawhorn frequently refused to follow supervisory commands, ceased work early, cursed his supervisor, and did not perform work assigned. Reference to Charging Party Exhibit 1 reflects the frequent and continuing problems Respondent had with Lawhorn. Charging Party Exhibit 2 reflects an incident where Lawhorn was missing from his workplace from 9 a.m. to noon 1 day and when asked where he was by his supervisor, said, ''I guess you didn't look in the right place.'' No warning or written reprimand was given him for this absence and it does not appear that a massive search ensued for him.

Respondent submitted evidence of two additional terminations at the hearing, for salaried nonexempt employees not in the voting unit fired since 1990.

a. One of these employees, G.B., was terminated in September 1991 for absenteeism and substance abuse. This employee, according to his personnel file, was a problem employee for several years. Toward the end of his employment, he was given two probation periods and a ''final work agreement'' spelling out the conditions he must meet to retain employment. He also had several ''Needs Improvement'' appraisals. (R. Exh. 20.)

b. The other employee, D.G., was terminated for substance abuse, absenteeism, and performance problems. According to his termination letter, he received repeated ''Needs Improvement'' appraisals and had been placed on probation. He too was given a final work agreement spelling out the terms under which he must perform to retain his job. He was terminated for failing a drug and alcohol test on the job in violation of the work agreement.

Although I would agree that Borgan was at all times a marginal employee, even Hunt agreed that he performed adequately for her for the 3 years preceding 1994. He was not shown to have done anything poorly or wrong in 1994 until July, after notice of the campaign had begun and Borgan began supporting that effort. Thereafter, though no discipline or warnings were given, Borgan's work is contended to have gone straight downhill. I find it noteworthy that he was not given a work agreement as were the employees noted above.

In conclusion, for all the reasons set forth above, I find that the General Counsel has made a strong prima facie case

that Borgan was terminated for engaging in union or other protected concerted activities and that the reasons asserted by Respondent for his termination are pretextual. I find that Respondent has not established by credible evidence that Borgan would have been terminated in the absence of his protected activity and Respondent's antiunion animus. Accordingly, I find that by discriminatorily discharging Borgan, Respondent has violated Section 8(a)(3) and (1) of the Act.

D. *Findings with Respect to the Objections to the Preelection Action Activity of Respondent*

Under the case of *Dal-Tex Optical Co*., 137 NLRB 1732 (1962), ''conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election.'' The Union's election objections and the complaint allegations are coterminous. I have heretofore found the conduct of Respondent complained of in Objections 1, 2, 3, and 4 was conduct violative of Section 8(a)(1) of the Act. Such conduct clearly destroyed the laboratory conditions surrounding the involved election. As the election was very close, the objectionable preelection conduct of Respondent certainly could have affected the outcome of the election. Accordingly, having sustained the Union's objections to election noted above, I will recommend that a rerun election be directed.[20]

CONCLUSIONS OF LAW

1. Allegheny Ludlum Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The following described unit constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time office clerical employees, plant clerical employees and unrepresented technical employees, including electronic turn technicians employed by the Employer at its Leechburg, Pennsylvania; Bagdad, Pennsylvania; Brackenridge, Pennsylvania; Natrona, Pennsylvania; Natrona Heights, Pennsylvania; Vandergrift, Pennsylvania; and Pittsburgh, Pennsylvania facilities; excluding all quality specialists, production and maintenance employees, employees currently represented by a labor organization, confidential employees including Secretary to Vice President of Human Resources, Secretary to Manager of Labor Relations, Secretary to Director of Labor Relations, Employment Interviewer, Secretary to Director of Employee Relations, Employee Relations Data Coordinator, Labor Relations Staffing Clerk, Secretary to Vice President of Operations and Secretary to Director of Safety, RNs, fire inspectors and guards, other professional employees and supervisors as defined in the Act.

4. Respondent has committed unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) About October 26, through Respondent's tax supervisor David Smith, unlawfully interrogating an employee about his union support, disparaging its employees because of their union sympathies by informing employees that they did not deserve to have a collective-bargaining agreement, and impliedly threatening that support for the Union would be futile as Respondent would not give the employees a contract.

(b) About October 26, through Smith, threatening employees with more onerous working conditions if they selected the Union as their collective-bargaining representative.

(c) About November 14, 15, and 16, by Supervisor of Communication Services Mark Ziemianski, polling employees about their union sentiments, by distributing to employees a written notice that employees who wished to be excluded from a company-sponsored video for use in its antiunion campaign should notify agents of Respondent that they did not desire to be included in the film's footage.

(d) About November 15, by Ziemianski, polling employees about their union sentiments by orally advising them that those employees who desired not to be included in the video described above must submit a written request to Respondent stating that they wished not to be included in the film's footage.

(e) About November 23, by distribution of Respondent's publication, ''Your Choice, Edition #2,'' to employees by United States mail, impliedly threatened employees with loss of jobs and loss of job security if they supported the Union.

(f) About November 23, by Respondent's chief executive officer, Art Aronson, threatening employees (1) that if they selected the Union as their collective-bargaining representative, the Union would be required to bargain to regain existing benefits; (2) threatening employees that if they selected a union that bargaining would be futile; and (3) threatening employees with job elimination and layoffs if the employees selected the union as their collective-bargaining representative.

5. Respondent has committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by, about January 17, 1995, terminating its employee James J. Borgan and since that date, failing and refusing to employ Borgan.

6. The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. The conduct found to constitute unfair labor practices in paragraphs 3 and 4 above is also conduct objectionable to the conduct of the election and Objections 1 through 4 are sustained. By the totality of its conduct, the Respondent unlawfully threatened, intimidated and coerced employees and destroyed the laboratory conditions necessary for a fair and impartial election.

REMEDY

Having found that Respondent has engaged in conduct in violation of Section 8(a)(1) and (3), it is ordered to cease and desist therefrom and to take certain affirmative action deemed necessary to effectuate the policies of the Act.

Having unlawfully discharged James J. Borgan on January 17, 1995, it is recommended that Respondent be ordered to offer him immediate reinstatement to his former position or if such position no longer exists, to a substantially equivalent

[20] The Notice of Second Election should include language informing employees that the first election was set aside because the Board found that certain conduct by the Respondent interfered with the employees' free choice. *Lufkin Rule Co*., 147 NLRB 341 (1964).

position, without prejudice to his seniority or other rights or privileges. It is further recommended that Respondent be ordered to make James J. Borgan whole for any loss of seniority, wages, or other benefits, with backpay commencing January 17, 1995, and continuing until a valid offer of reinstatement is made. Backpay is to be computed in accordance with the Board's formula as set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I further recommend that Respondent be ordered to remove any reference to the unlawful discharge of James J. Borgan from its files and notify him in writing that this has been done and that the unlawful discharge will not be used against him in any future personnel action.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, Allegheny Ludlum Corporation, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully interrogating its employees about their union support, disparaging its employees because of their union sympathies by informing employees that they do not deserve to have a collective-bargaining agreement, and impliedly threatening that support for the Union would be futile as Respondent would not give the employees a contract.

(b) Threatening employees with more onerous working conditions if they select the Union as their collective-bargaining representative.

(c) Polling employees about their union sentiments, by distributing to employees a written notice that employees who wished to be excluded from a company-sponsored video for use in its antiunion campaign should notify agents of Respondent that they did not desire to be included in the film's footage.

(d) Polling employees about their union sentiments by orally advising them that those employees who desired not to be included in the video described above must submit a written request to Respondent stating that they wished not to be included in the film's footage.

(e) Impliedly threatening employees with loss of jobs and loss of job security if they supported the Union.

(f) Threatening employees (1) that if they selected the Union as their collective-bargaining representative, the Union would be required to bargain to regain existing benefits; (2) threatening employees that if they selected a union that bargaining would be futile; and (3) threatening employees with job elimination and layoffs if the employees selected the Union as their collective-bargaining representative.

(g) Discharging its employees because they engage in union or other protected, concerted activities.

(h) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate reinstatement to James J. Borgan to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges he previously enjoyed, and expunge from its files any reference to the unlawful discharge of James J. Borgan and notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

(b) Make James J. Borgan whole for any loss of wages or other benefits he may have suffered as a result of his unlawful discharge in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for use in complying with the terms of this Order.

(d) Post at its facilities in Leechburg, Bagdad, Brackenridge, Natrona, Natrona Heights, Vandergrift, and Pittsburgh, Pennsylvania, copies of the attached notice marked ''Appendix.''[22] Copies of the notice, on forms provided by the Regional Director for Region 6, being after signed by the Respondent, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election conducted in Case 6–RC–11113 on December 2, 1994, be set aside and that the Regional Director for Region 6 conduct a second election at a time he deems appropriate.

Dated, Washington, D.C. July 28, 1995

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided by Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives all employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

In recognition of these rights we hereby notify our employees:

WE WILL NOT unlawfully interrogate our employees about their union support, disparage our employees because of their union sympathies by informing employees that they did not deserve to have a collective-bargaining agreement, and impliedly threaten our employees that support for the Union would be futile as we would not give our employees a contract.

WE WILL NOT threaten our employees with more onerous working conditions if they select the Union as their collective-bargaining representative.

WE WILL NOT poll our employees about their union sentiments, by distributing to employees a written notice that employees who wished to be excluded from a company-sponsored video for use in our antiunion campaign should notify our agents that they did not desire to be included in the film's footage.

WE WILL NOT poll our employees about their union sentiments by orally advising them that those employees who desired not to be included in the video described above must submit a written request to us stating that they wished not to be included in the film's footage.

WE WILL NOT impliedly threaten our employees with loss of jobs and loss of job security if they support the Union.

WE WILL NOT threaten our employees (1) that if they select the Union as their collective-bargaining representative, the Union would be required to bargain to regain existing benefits; (2) threaten our employees that if they select a union that bargaining would be futile; and (3) threaten our employees with job elimination and layoffs if our employees select the Union as their collective-bargaining representative.

WE WILL NOT discharge our employees because they engage in union or other protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer immediate reinstatement to James J. Borgan to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to the seniority or other rights or privileges he previously enjoyed, and expunge from our files any reference to the unlawful discharge of James J. Borgan and notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

WE WILL make James J. Borgan whole for any loss of wages or other benefits he may have suffered as a result of his unlawful discharge, with interest.

ALLEGHENY LUDLUM CORPORATION